Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

MARILYN B. DIONNE,

Petitioner,

vs.

DONNA SHALALA,
SECRETARY, U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eighth Circuit improperly decline to reconsider the determination of its sharply divided Panel in light of the intervening decision by this Court in Reeves v. Sanderson Plumbing Products., Inc., No. 99-536 slip op., 120 S.Ct. 2097 (June 12, 2000), where:

A. The Panel improperly shifted from the employer to the employee the burden of explaining actions as to which Petitioner presented evidence that the District Court and the Eighth Circuit Panel found to be *prima facie* discriminatory.
B. The employer was acknowledged to have not stated a legitimate nondiscriminatory explanation for its disputed actions, but the Panel attributed such actions to "an honest mistake" or "inadvertence".
C. Petitioner was not allowed to present her evidence of pretext to the factfinder at trial.

II. Did the United States Court of Appeals for the Eighth Circuit, acting through its divided Panel, violate the burden shifting requirements applicable to cases alleging illegal discrimination, as set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and thereafter, reaffirmed and clarified in Reeves, where:

A. The Panel improperly shifted from the employer to employee the burden of explaining actions as to which Petitioner presented evidence that the District Court and the Panel found to be *prima facie* discriminatory.
B. The employer was acknowledged not to have stated a legitimate nondiscriminatory explanation for its disputed actions, but the divided Eighth Circuit Panel

attributed such actions to "an honest mistake" or "inadvertence".

C. Petitioner was not allowed to present her evidence of pretext to the factfinder at trial.

III. Did the Eighth Circuit Panel Majority err in its affirmation of the grant of Summary Judgment by the District Court, where the District Court usurped the role of the factfinder at trial by weighing the evidence, after finding that the Petitioner presented a *prima facie* case of discrimination along with additional evidence of discrimination, and determining that the cumulative evidence was insufficient as a matter of law to create a reasonable inference of intentional discrimination.

PARTIES TO THE APPEAL

Marilyn Dionne and Donna E. Shalala, Secretary, U.S. Department of Health and Human Services were parties to the proceedings below, as Petitioner and Defendant respectively.

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The Majority and Dissenting opinions of the Panel of the United States Court of Appeals for the Eighth Circuit are reported as Dionne v. Shalala, 209 F.3d. 705 (8th Cir. 2000) and are reprinted in the Appendix to the Petition of Dionne, ("App." or "Appendix") beginning at page A-1. The Order of the United States Court of Appeals for the Eighth Circuit denying Dionne's Petition for Rehearing and for Rehearing En Banc, dated June 27, 2000, is reprinted in the Appendix beginning at page A-30.

A Memorandum and Order of the Honorable Patrick A. Conmy of the United States District Court, District of North Dakota, Northwestern Division, Case No. A4-96-130, granting Summary Judgment in favor of the Defendant, was entered on June 22, 1998. Though not reported, the District Court's decision is reprinted in the Appendix, beginning at page A-18. The Memorandum and Order denying Petitioner's Motion for Reconsideration of Summary Judgment, Case No. A4-96-130, was entered on July 29, 1998. It was also unpublished and appears reprinted in the Appendix, beginning at page A-28.

STATEMENT OF JURISDICTIONAL GROUNDS

The decision of the Panel Majority of the United States Court of Appeals for the Eighth Circuit as to which the Petitioner now seeks review, was decided April 5, 2000. The Order Denying Rehearing of the United States Court of Appeals for the Eighth Circuit was issued on June 27, 2000.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and a writ of certiorari is requested under Supreme Court Rule 10 subdivisions (a) and (c).

LEGAL AUTHORITIES INVOLVED IN THE CASE

This case focuses primarily on a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, 42 U.S.C. § 2000e-16. 42 U.S.C. § 2000e-5(f), (k) and (j), 42 U.S.C. § 1981, and 42 U.S.C. § 1983. This case also involves Fed. R. Civ. P. 50 and the Indian Preference Act, 25 U.S.C. § 472 (1988).

STATEMENT OF THE CASE

Petitioner Marilyn B. Dionne is an enrolled member of the Turtle Mountain Band of Chippewa Indians. She is an employee of the Public Health Service ("PHS", also referred to herein as Indian Health Service or "IHS") Hospital in Belcourt, North Dakota, which is located within the Reservation where she is a member and has resided for most of her life. Petitioner claims violation of Title VII against Respondent Donna E. Shalala, Secretary, U.S. Department of Health and Human Services ("Secretary") for the downgrade of Petitioner's grade level from GS-9 to GS-7 in 1993 when she transferred to a Community Health Nurse position. Petitioner alleges discrimination on the basis of her national origin as Turtle Mountain Band of Chippewa and her race as an American Indian. The District Court found, and the Eight Circuit Panel Majority accepted, that Petitioner "has sufficiently established the elements of a *prima facie* case of disparate treatment" based on race and nationality. Dionne v. Shalala, No. A4-96-130 (N.W. ND June 22, 1998) (App. A-22).[1] As an aspect of the improper racial and national origin discrimination directed against her, Petitioner asserts that Indian Preference under 25 U.S.C. § 472 was not complied

[1] "The district court held, and the majority accepts that Dionne established a *prima facie* case." Dionne v. Shalala, 209 F.3d at 711 n. 11 (Lay, J., dissenting) (App. A-13).

with in her transfer. A Caucasian nurse with fewer qualifications subsequently was hired, in 1994, to a similar position at GS-11 and received a significantly higher salary and supervisory authority.

Petitioner received a Licensed Practical Nurse ("L.P.N.") degree from the Lide Region Junior College in 1976 and an Associate of Science degree in 1989 from Turtle Mountain Community College. In May of 1991, Petitioner received her Bachelor of Science ("B.S.") degree in Nursing from the University of Mary in Bismarck, North Dakota, where she was recognized for her superior academic achievement. Petitioner was also licensed as a Registered Nurse ("R.N.") in the State of North Dakota in 1991. Prior to receiving her B.S., Petitioner was employed for four years as an L.P.N. by Tri-Care Home Health in Rolla, North Dakota.

After receiving her B.S. and passing her boards, Petitioner was hired as a Clinical Nurse at the Belcourt PHS Hospital in 1991, where she worked in various nursing units such as the Emergency Room, Labor and Delivery, Post Partum, Cardiac, Medical, Surgical, Recovery and Outpatient. See Petitioner's Initial Affidavit Accompanying her Equal Employment Opportunity (EEO) Complaint to the Department of Health and Human Services, which incorporates Petitioner's Letter to Lynn Davis, Administrative Officer EEO Counselor ("Petitioner's Aff."), (App. A-66–A-71). Petitioner was already experienced in many of these areas because she had been working as an L.P.N. since 1976. Id. As the PHS Hospital is a part of the Indian Health Services, an agency of the Department of Health and Human Services, Petitioner's level of responsibility and pay rate was based upon the General Schedule established by 5 U.S.C. § 5101-5515.[2]

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[2] The decision of the Eighth Circuit Panel more fully explained the General Schedule: "Positions are classified according to their difficulty and level of responsibility and pay rates are set accordingly. For example, grade GS-1 positions, which currently pay an annual salary of up to

Petitioner was hired at the GS-7 level on June 1, 1993 and, after successfully performing her job duties for one year, was promoted to the GS-9 level. Petitioner's GS-9 level experience included conducting unassisted home visits, during which she assessed, monitored and evaluated the patients' physical, mental, and social needs, dispensed medication and drew blood to be sent to the laboratory for testing. Petitioner's Aff. (App. A-68). Among other things, Petitioner also assisted with setting up evening Childbirth Classes, functioned as a preceptor for student nurses, worked with Tribal officials and Tribal Council members, worked with the PHS staff in all areas regarding her clients and other matters, taught First Aid, and orientated new staff. Id.

Desiring to focus her work on home health and community nursing services, expanding upon the services she had performed for four years at her former employment and for several years at the Belcourt PHS hospital, Petitioner applied for a position as a Public Health Nurse at the PHS Hospital. She noted upon her application that she was an American Indian and therefore eligible for the Indian Preference under 25 U.S.C. § 472.

Upon the transfer to public health nursing, Petitioner was demoted from a GS-9 level to a GS-7 level. Delbert Haskell, the agency decision maker who reviewed Petitioner's application, failed to apply the proper criteria and, as a result, determined that the downgrade was appropriate due to Petitioner's alleged lack of one year of experience in public health nursing.[3] Petitioner was also told that the demotion of

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$20,000, are characterized by the 'simplest routine work' under 'immediate supervision, with little or no latitude for the exercise of independent judgment', while GS-15 positions, which currently pay an annual salary of up to $117,000, are characterized by 'work of outstanding difficulty and responsibility.' 5 U.S.C. § 5104." Dionne, 209 F.3d at 706 (App. A-3).

[3] Although Petitioner had four years of experience in community nursing as an L.P.N., Haskell determined that was not relevant for

nurses was commonly practiced to discourage employees from transferring from one area of nursing to another. See Dionne Deposition (App. A-105–A-106). In actuality, Petitioner was required to accomplish one year of specialized experience as a Community Health Nurse as an R.N. in order

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determining Petitioner's grade level. See Petitioner's Aff. (App. A-66–A-70). Haskell applied the U.S. Office of Personnel Management ("OPM") qualification standards ("X-118 standards"), which required a year in public health nursing at the next lower grade level (GS-7) for a GS-9 position. Regardless of whether or not Haskell properly determined that Petitioner's four years of experience as an L.P.N. were irrelevant, he applied the wrong standards when determining the grade level for Petitioner.

Under the Indian Preference Act and various court decisions interpreting the Act, the applicable standards at the time of Petitioner's application for a position as a public health nurse are the standards contained in a December 1986 transmittal sheet. See Indian Health Service, Excepted Service Qualification Standards for Community Health Nurse Positions, Transmittal Sheet No. 1 (1986) ("1986 standards") (App. A-31–A-54); see also Dionne, 209 F.3d at 708 (App. A-8–A-9; A-8–A-9 n. 6). This modification of the general OPM qualification standards were a result of the interpretation of the Indian Preference Act by the United States Court of Appeals for the Ninth Circuit in Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984). In Preston, the Ninth Circuit held that the Indian Preference Act requires that "the Secretary establish separate standards for evaluating the qualifications of Indians for employment in the Indian Health Service." Id. at 1369-70. See also Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 716 (8th Cir. 1979).

Although the separate standards were established, Haskell did not apply the standards when evaluating the application of Petitioner or several other members of the Turtle Mountain Band of Chippewa, including Doris Gunville, Linda LaFromboise and Marianne Belgarde. See Dionne Deposition (App. A-105–A-109). See also Petitioner's Aff. (App. A-66). Under the 1986 standards, along with her B.S. in Nursing, Petitioner would be required to have two years of experience in public health nursing to qualify for employment at the GS-9 level. Unlike the X-118 standards, that experience does not need to be at the grade level immediately below. Had Haskell properly applied either set of standards when reviewing Petitioner's application, she would have qualified, at minimum, for the GS-9 level.

to qualify for a grade higher than GS-7. She had 4 years of such experience as an L.P.N. on her home Reservation. She was, however, licensed as an R.N. by the State of North Dakota and performed services equivalent to such. Thus, Petitioner had more than the equivalent to one year of professional nursing experience sufficiently related to her chosen specialty.

Significantly, several other members of the Turtle Mountain Band of Chippewa Indians were also required to accept a similar demotion upon their respective transfers to public health nursing, including Doris Gunville, Linda LaFromboise, and Marianne Belgarde. Petitioner's Aff. (App. A-66). Petitioner accepted the demotion and commenced employment as a Community Health Nurse only because of her unwavering commitment to public health nursing and her desire to serve her community and her people.

Petitioner began her employment at the Belcourt PHS hospital as a Community Health Nurse on June 1, 1993. Shortly thereafter, on May 15, 1994, Susan Kartes, a non-Indian woman with less experience serving the Turtle Mountain Community was hired by IHS. Ms. Kartes was hired at the GS-11 level. Although she was two grade levels lower, Petitioner possessed more applicable experience in public health nursing and was consequently assigned to be a preceptor for Ms. Kartes to guide and instruct her. Petitioner's Aff., (App. A-67); see also Deposition of Susan Kartes (acknowledging that preceptor assignments are posted), (App. A-122); see also Preceptor Assignment List (App. A-125).

Following Ms. Kartes' employment at the higher pay grade, Petitioner initiated an unsuccessful Equal Employment Opportunities Commission Complaint. Following the resolution of the complaint, Petitioner filed suit alleging discrimination under the Indian Preference Act and Title VII of the 1964 Civil Rights Act, based upon her race as an

American Indian and her nationality as a Turtle Mountain Chippewa. When Petitioner first initiated her lawsuit, she invoked the original jurisdiction of the U.S. District Court pursuant to various federal statutes, including 28 U.S.C. § 1331, 28 U.S.C. § 1343 (a)(3) and (4), 42 U.S.C. § 1346, 42 U.S.C. § 1361, 42 U.S.C. § 1367, 42 U.S.C. § 1988, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., as amended, 42 U.S.C.§ 2000e-16, 42 U.S.C. 2000 e-5(f), (k) and (j), 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

A motion for Summary Judgment by the Defendant Secretary was initially denied. Thereafter, however, several weeks prior to the scheduled trial, on June 22, 1998, the District Court reversed itself and granted Summary Judgment. As previously noted, the District Court acknowledged that Petitioner had presented a *prima facie* case of discrimination. Dionne v. Shalala, No. A4-96-130 (N.W. ND June 22, 1998) (App. A-22). However, the District Court decided that the Defendant had rebutted the presumption of discrimination by pointing to the general qualification standards (U.S. Office of Personnel Management ("OPM") qualification standards ("X-118 standards")) as a legitimate, non-discriminatory reason for the decision. Petitioner argued that the Defendant's reason was pretextual because of the failure to apply the Indian Preference qualifications as required by law. Id., App. A-20.[4] The District Court, *sua sponte*, located the Plan for

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[4] The Indian Preference Act, 25 U.S.C. § 472 (1994). As the Eighth Circuit Panel recognized: "The Indian Preference Act does more than simply require preference in employment decisions for qualified Indian applicants; it 'requires the Secretary to establish separate standards for evaluating the qualifications of Indians for employment in the Indian Health Service.'" Dionne, 209 F.3d at 707, citing Preston v. Heckler, 734 F.2d 1359, 1369-70 (9th Cir. 1984) (App. A-6).

The Eighth Circuit Panel continued: "Furthermore, in Oglala Sioux, on which Preston relies, we held that the Indian Preference Act forbids, the "blind transference of general Civil Service principles." Id., citing Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979).

the Completion of the Review of Qualification Standards for Indians in the Excepted Service, 57 Fed. Reg. 57,070-01 (1992) ("1992 standards"), recognized that said plan adopted two selective/quality ranking factors applicable to American Indians claiming Indian Preference which augment the OPM qualification standards, determined it was applicable,[5] and held that because the Secretary had adopted such standards "no reasonable trier of fact could find issue as to whether the Secretary's proffered nondiscriminatory reason [was] pretextual." Dionne v. Shalala, No. A4-96-130 (N.W. ND June 22, 1998) (App. A-26).

In other words, the District Court found that the mere publication of such standards, without any evidence of their usage in the instant case, defeated Petitioner's pretext argument. More specifically, the District Court *sua sponte* weighed Petitioner's evidence of intentional discrimination and found it insufficient to support a claim of intentional

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[5] The 1992 standards, however, were not applicable to Petitioner's application: "the District Court erred as a matter of law, inasmuch as the X-118 standards were not the standards the Secretary should have applied." Dionne, 209 F.3d at 708 (App. A-9). The Indian Health Service Excepted Service Qualification Standards for Community Health Nurse Positions, Transmittal Sheet No. 1 (1986)("1986 standards") (App. A-31–A-54), were recommended by a steering committee established after the Preston decision. The steering committee identified a number of occupations and created standards for them as a pilot study. Public health nursing was one occupation covered in the 1986 standards. The 1992 standards were designed to complete the steering committee's duties and provide standards for the occupations not covered in the 1986 standards. See App. at A-60–A-65. The 1992 standards direct that the X-118 standards should be used to judge Indians applying for positions not covered in the 1986 standards. The 1992 standards also included two optional factors, ability to speak and interpret the language of the Native American population to be served and knowledge of the culture, customs, and beliefs of the Native American population to be served, which the agency official may take into account when grading the applicant. Id. (App. A-61.) However, since public health nursing is covered in the 1986 standards, the 1992 standards are inapplicable.

discrimination.[6] Curiously, the Defendant had neither pled nor argued the 1992 standards and, thus, presumably would not have knowingly applied them. Further, Delbert Haskell, the Agency decisionmaker, could not have applied such standards as he was unaware of them. Indeed, when asked on deposition whether he had any standards that he applied which related uniquely to Indian preference issues, he replied, "No." Haskell Deposition (App. A-82–A-84) .

Petitioner timely filed a motion for reconsideration, which was denied on July 29, 1998. Petitioner then timely filed an appeal with the Eighth Circuit. In a sharply divided Panel Decision,[7] the Eighth Circuit Panel Majority

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[6] The District Court stated: "As circumstantial evidence of intentional discrimination, Marilyn avers that three other Native American Indian female nurses have had to "accept demotion in order to make the transition from Clinical Nursing to Public [community] Health Nursing, and that, "In order to make the change [from clinical nurse to community health nurse], I was told by Mr. Clarence Frederick, Service Unit Director, that I would have to take a demotion to GS-7, 'Because that's the way it is.' There was no other explanation." Petitioner's Aff. (App. A-66). Even to accept these assertions as true, this Court finds such evidence insufficient to support any reasonable inference that the Secretary's application of the [1992] standards in classifying Petitioner as a GS-7 community health nurse, was based upon intentional discrimination." Dionne v. Shalala, No. A4-96-130 (N.W. ND, June 22, 1998), (App. A-27) (Bold parenthesis added).

[7] Among other things, Judge Lay stated in his forceful dissent: "the majority's affirmance of the district court's grant of summary judgment in favor of the Secretary . . . is egregiously wrong. It is in direct opposition to the law announced by the Supreme Court of the United States. . . . On the record before us, the Secretary failed to articulate a legitimate, nondiscriminatory reason for the employment decision; thus, Dionne's *prima facie* case and its corresponding presumption remain unrebutted. Consequently, the district court should have granted judgment as a matter of law in favor of Dionne. In failing to do so, the district court, and now this court permit a governmental agency to escape liability under Title VII by pleading ignorance of its own rules, legislation, and of anti-discrimination laws. . . . At the very least, the plaintiff has demonstrated, and this court now agrees, that the employer's articulated reason was not

acknowledged the District Court's confusion regarding the 1992 standards,[8] but nevertheless affirmed the decision of the District Court on April 5, 2000.[9] The Eighth Circuit Panel Majority also relieved the Secretary of the burden of producing evidence which established that Petitioner was rejected for a legitimate, nondiscriminatory reason. Moreover, like the District Court, the Eighth Circuit Panel Majority *sua sponte* weighed Petitioner's evidence of intentional discrimination and concluded that such evidence was insufficient to create a reasonable inference of intentional discrimination.[10] It thereupon proposed reasons for the

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the true reason and the trier of fact should then determine whether a mistake or discriminatory animus motivated the Secretary's action. . . . In all of the precedents of this court as well as those of the United States Supreme Court, where the employer's articulated reason is shown to not be the true reason, then pretext is deemed to have been shown and the trier of fact must be given the opportunity to infer whether the given reason hides intentional discrimination." Dionne, 209 F.3d at 710, 712, 713 (App. A-11; A-15; A-16; A-17).

[8] "Unfortunately, the District Court was unaware of the applicable qualification standards contained in the December 1986 transmittal. The District Court, citing the December 1992 notice, concluded that the Secretary correctly applied the X-118 standards to Petitioner's application. On this point, the District Court erred as a matter of law, inasmuch as the X-118 standards were not the standards the Secretary should have applied." Dionne, 209 F.3d at 709 (App. A-8–A-9).

[9] Though the Eighth Circuit Panel recognized that District Court had identified the wrong standards, it stated that "[t]here is absolutely no evidence that the application of the wrong standards was anything but an honest mistake." Dionne, 209 F.3d at 709 (App. A-10).

[10] In reaching its determination, the Eighth Circuit Panel stated: "Dionne's only evidence of intentional discrimination is that three other Native American nurses also accepted lower grade positions in their transfer from clinical nursing to public health nursing and that the service unit director's only explanation for her grade was 'Because that's the way it is.' (App. A-9.) We conclude, as the District Court did, that this evidence is insufficient as a matter of law to create a reasonable inference

Secretary's failure, those being either "an honest mistake" or "inadvertence".[11] Both were "reasons" neither party had suggested.

Petitioner immediately filed a Motion for Reconsideration. While the Motion was still pending, on June 12, 2000 (the same day Petitioner received the Secretary's response to her Petition for Rehearing), this Court issued its opinion in the case of Reeves v. Sanderson Plumbing, Inc., No. 99-536, slip op., 120 S.Ct. 2097 (U.S. June 12, 2000). Since the Eighth Circuit Panel Majority reached its decision several months prior to Reeves, it lacked the clear guidance provided by this Court therein as to issues that are critical to Petitioner's case. Accordingly, Petitioner filed a memorandum with the Eighth Circuit, bringing the Reeves decision to its attention.

Although the earlier decision of the divided Eighth Circuit Panel was directly in conflict with this Court's decision in Reeves, the Eighth Circuit denied Petitioner's motion on June 27, 2000, noting that Judge McMillian and Judge Arnold would have granted a rehearing.

REASONS FOR GRANTING THE WRIT

The Panel Majority of the United States Court of Appeals for the Eighth Circuit determined important federal questions regarding standards to be applied in review of an employment discrimination claim in a way that conflicts directly with the recent decision of this Court in Reeves v. Sanderson Plumbing Products., Inc., No. 99-536 slip op., 120 S.Ct. 2097 (U.S. June 12, 2000).

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that intentional discrimination was a factor in the grading decision." Dionne, 209 F.3d at 709 (App. A-9–A-10).

[11] See Dionne, 209 F.3d at 709, 710 (App. A-10; A-11; A-10 n. 8).

I. THE DECISION OF THE EIGHTH CIRCUIT PANEL MAJORITY IN THE INSTANT CASE CONFLICTS DIRECTLY WITH THIS COURT'S DECISION IN REEVES V. SANDERSON PRODUCTS, INC., 120 S.CT. 2097 (U.S. JUNE 12, 2000)

In Reeves v. Sanderson Plumbing Products, Inc., this Court ruled unanimously that an employee presenting a *prima facie* case of unlawful discrimination is entitled to proceed to trial when factual issues are in dispute, even though the trial court may believe that the employer possessed a nondiscriminatory reason for the determination at issue, and the plaintiff presents no direct evidence of intentional bias. Reeves, slip op. at 12, 120 S.Ct. at 2108. Thus, at the outset, the decision of the Eighth Circuit Panel Majority in the case at bar conflicts directly with Reeves for the following reasons, among others: (1) both the District Court and Eighth Circuit Panel Majority recognized that Petitioner established her *prima facie* of unlawful discrimination and, further, presented additional evidence of discrimination; (2) factual issues remain in dispute as to the Secretary's reason for rejecting Petitioner's application; (3) the Eighth Circuit Panel recognized that the record contained no reason why the Secretary rejected Petitioner's application and, therefore, it developed, presented, and then relied upon a reason not stated in the District Court record that it felt would be appropriate for rejection; and (4) the Eighth Circuit Panel Majority *sua sponte* weighed Petitioner's evidence of discrimination and determined it was insufficient, thus denying her right to present her pretext evidence for consideration by the factfinder at trial.

In Reeves, the Petitioner was a fifty-seven year old employee who had worked for a manufacturer for forty years before he was fired. Reeves filed suit, claiming that he was terminated because of his age, in violation of the Age

Discrimination in Employment Act of 1967 (ADEA). At trial, his employer contended the Reeves was discharged because he failed to maintain accurate timekeeping records. Reeves, slip op. at 2, 120 S.Ct. at 2103. Reeves attempted to show that the individual wielding "absolute power" in the company had made various statements which demonstrated age-based animus and that a faulty time clock accounted for much of the allegedly "shoddy record keeping." Id. at 2-3, 120 S.Ct. at 2103.

At trial, the District Court twice denied the employer's oral motions for judgment as matter of law and the case ultimately went to the jury. The jury was instructed that "[i]f the plaintiff failed to prove age was a determinative or motivating fact in the decision to terminate him, then your verdict shall be for the defendant." Id. at 3, 120 S.Ct. at 2103. The jury returned a verdict for Reeves. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the District Court's denial of the employer's motion for judgment as a matter of law. In rendering judgment for the employer, the court acknowledged that based upon the evidence presented, "a reasonable jury [could] have found that [Respondent's] explanation for its employment decision was pretextual." Id. at 3, 120 S.Ct. at 2103. Nevertheless, the Fifth Circuit continued to explain that a finding as to whether the employer was forthright in the explanation for the firing was not dispositive of the ultimate issue in the case, which was "whether Reeves presented sufficient evidence that his age motivated [Respondent's] employment decision." Id. at 3, 120 S.Ct. at 2103. The Fifth Circuit *sua sponte* weighed the evidence of pretext presented by Reeves, placed its probative value into context, and concluded that the evidence was not sufficient to support the jury's finding of discrimination.

In reversing the Fifth Circuit, this Court ruled that, since Petitioner presented a *prima facie* case of unlawful discrimination with some factual issues being in dispute, he

was entitled to have his claim proceed to trial under the framework established previously in McDonnell Douglas v. Green, 411 U.S. 792 (1973).

A. The Decision of the Eighth Circuit Panel Majority Conflicts Directly with this Court's Clarification of the McDonnell Douglas Framework in Reeves.

This Court granted certiorari "to resolve a conflict among the Courts of Appeals as to whether plaintiff's *prima facie* case of discrimination (as defined in McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)),combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." Reeves, slip op. at 4, 120 S.Ct. at 2104. This Court then unanimously reaffirmed the integrity of each step of the McDonnell Douglas framework and criticized the circuit courts that had deviated from the analysis by shifting the burden of explaining actions where were *prima facie* discriminatory from the employer to the employee.

More specifically, in Reeves, this Court clarified the McDonnell Douglas framework by emphasizing that once the Plaintiff establishes a *prima facie* case of discrimination, "[t]he burden...shift[s] to respondent to 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.'" Reeves, slip op. at 7, 120 S.Ct. at 2106 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). With regard to this intermediary evidentiary burden, this Court emphasized that "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" Id. at 7, 120 S.Ct. at 2106 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993)). Thus, "the presumption of discrimination 'drops out of the picture' [only when] the defendant meets its

burden...." Id. at 8, 120 S.Ct. at 2106. If the defendant does establish a legitimate non-discriminatory reason for the action, then "the plaintiff...must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id. at 7, 120 S.Ct. at 2106.

Herein, Petitioner herein established her *prima facie* case and additionally advanced evidence that three other American Indian nurses, each a member of the Turtle Mountain Chippewa Tribe, were required to take similar demotions, while a Caucasian nurse with similar or less experience was promoted in grade level. Petitioner further produced additional evidence that (1) she was advised the reason was because, "That's the way it is." See Petitioner's Aff., App. at A-66; see also Dionne Deposition, App. at A-106; and (2) the practice or pattern of demotion was designed to discourage nurses within her hospital from transferring to public health nursing. See Dionne Deposition (App. A-106–A-109).

Thus, in order to avoid a direct conflict with Reeves, the Secretary was obligated to introduce evidence of a legitimate non-discriminatory explanation for the discrimination. However, in the instant case, the Secretary did not meet the required burden of production by articulating a legitimate non-discriminatory explanation for the action.[12] Rather, the District Court, upon its own initiative, located and cited the 1992 standards as a purportedly legitimate, non-discriminatory explanation for the action taken by the

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[12] The Secretary pointed to the X-118 standards as the legitimate explanation for the decision. This was not a "legitimate explanation" because the X-118 standards were not used by the decisionmaker and, further, were not applicable to Petitioner's application. Further, the District Court's grant of Summary Judgment was based upon its own research into the 1992 standards, not the Secretary's "legitimate explanation".

Secretary.[13] Although the Eighth Circuit Panel recognized that the District Court erred when it relied upon the 1992 standards as a legitimate explanation for the Secretary's actions,[14] the Panel Majority failed to realize that the District Court's analysis cannot be sustained under a proper application of the McDonnell Douglas framework. In other words, the Eighth Circuit Panel Majority failed to recognize that, since the Secretary did not articulate a legitimate, nondiscriminatory reason for the action alleged to be discriminatory, the burden of production never shifted. Put differently, the Eighth Circuit Panel Majority failed to apply the second step of the McDonnell Douglas framework, contrary to the direct guidance of this Court in both Reeves and McDonnell Douglas. Instead, the Eighth Circuit compounded the District Court's error by hypothesizing that the Secretary's use of the wrong standards when evaluating Petitioner's application was merely "an "honest mistake" or

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[13] Haskell, however, admits that he did not use any special standards, including the 1992 standards, when evaluating Petitioner's application. As the Eighth Circuit Panel recognized: "While the record is not a model of clarity on this point, we believe Petitioner is correct on this point" [i.e., the Secretary applied the general civil service qualification standards then known as the X-118 standards]. "Haskell's affidavit refers to qualification standards for general scheduled positions. And, in response to whether he applied 'any special standards that were different from civil service that were meant to reflect her Indian background, Haskell stated, 'No.'" Dionne, 209 Fed 3d at 707 n. 4 (App. A-5).

The District Court apparently assumed that since the 1992 standards reference the X-118 standards with two additional factors which may be considered, ability to speak and interpret the language of the Native population to be served and knowledge of the culture, customs, and beliefs of the Native American population to be served, evidence that the X-118 standards were applied was sufficient, even though there is no evidence regarding whether the two additional factors were considered when grading Petitioner's application.

[14] The correct standards were the 1986 standards, not the 1992 standards. See note 8, supra.

"inadvertent." Dionne, 209 F.3d at 709 n. 8 (App. A-10). Thus, by assuming an "honest mistake" or "inadvertence" by the Secretary, the Eighth Circuit Panel Majority, like the District Court before it, and the Fifth Circuit in Reeves, strayed from the proper McDonnell Douglas analysis by shifting the burden of explaining actions which were *prima facie* discriminatory from the employer to the employee. In doing so, the analysis of the Eighth Circuit Panel conflicts directly with the analysis of this Court in Reeves.

B. Since the Secretary's Articulated Reason for the Adverse Employment Action was Not the True Reason, the Determination of Whether Discriminatory Animus Motivated the Secretary's Action Must Be Made by the Factfinder at Trial.

Remarkably, the Eighth Circuit Panel Majority also failed to recognize that, by finding that the Secretary applied the wrong standards, it impliedly found that the explanation offered by the Secretary at the District Court level could no longer be legitimate.[15] Like the Fifth Circuit in Reeves, the Eighth Circuit "misconceived the evidentiary burden borne by plaintiffs." Reeves, slip op. at 11, 120 S.Ct. at 2108.

> That is, the Court of Appeals proceeded from the assumption that a *prima facie* case of discrimination, combined with sufficient evidence for a trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is

[15] Under Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), the employer's burden is discharged if the employer articulates a lawful reason for the action. The Secretary's illegal application of the wrong standards cannot be a lawful explanation for the action.

insufficient as a matter of law to sustain a [ ] finding of intentional discrimination.

Id. As this Court further recognized in Reeves:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and may be quite persuasive. . . .In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonestly about a material fact as "affirmative evidence of guilt" Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. at 12, 120 S.Ct. at 2108.

It is clear that the Eighth Circuit Panel's failure to properly address the evidence[16] that tends to show that the

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[16] In dissent Judge Lay states, "In this matter, after Dionne established her *prima facie* case, the Secretary's proffered 'legitimate, nondiscriminatory reason' for its action rested solely on the conclusion that she was not qualified for higher grade under the general civil service qualification standards. The majority now concedes that the Secretary acted unlawfully in applying these standards; yet it allows such illegality to stand. Such a conclusion belies logic" Dionne, 209 F.3d at 710 (Lay, J. dissenting), Appendix at A-13–A-14.

In reflecting upon these words, the Majority concedes that "[t]here is, of course, a sense in which [Judge Lay's characterization of the application of the wrong standards as being unlawful] is true. . . the Secretary's use here of the wrong standards was improper under the

Secretary's proffered reason was false conflicts directly with this Court's decision in Reeves.

C. Petitioner is Entitled to Present Her Evidence of Pretext to the Factfinder at Trial.

Even assuming *arguendo* that the Secretary did meet the burden of production under the McDonnell Douglas framework, summary judgment for the Secretary was inappropriate under Reeves and McDonnell Douglas because Petitioner presented evidence of pretext which was unrebutted. After *sua sponte* holding out the 1992 guidelines as a legitimate non-discriminatory reason for the Secretary's action, the District Court also took it upon himself *sua sponte* to evaluate Petitioner's evidence that the explanation offered by the Secretary was merely pretextual and find it lacking. As noted in the Statement of the Case above, trial testimony would be available as to three other American Indians who are members of the Turtle Mountain Chippewa, the same Tribe as Petitioner, who similarly were required to step down in level when they applied for and were accepted to public health nurse positions. Further, as additionally noted above, Petitioner presented evidence that the only explanation given for the requirement that these nurses accept a decreased pay level was, "[b]ecause that's the way it is." Note 6, supra. Petitioner also argued that the failure to apply the proper standards also provides evidence of pretext on the part of the Secretary. The District Court, however, first acknowledged and then discounted Petitioner's evidence of pretext and

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qualification standards promulgated by the agency in accordance with the Indian Preference Act, but not under Title VII. On the record before us, the application of the wrong standards was merely inadvertent and simply a mistake of law." Dionne, 209 F.3d at 709 n. 8, Appendix at A-10.

However, as Judge Lay recognized, "Such illegality is intricately related to the Title VII claim at stake." Dionne, 209 F.3d at 711 n. 12, Appendix at A-14.

granted Summary Judgement for the Secretary based upon its own analysis of the evidence of discrimination Petitioner had presented. By weighing the probative value of the evidence presented by Petitioner and determining that Petitioner's evidence regarding the other three nurses and the improper standards were not sufficient, the District Court improperly usurped the function of the factfinder at trial.

The divided Eighth Circuit Panel affirmed the decision of the District Court, holding that the evidence was not sufficient to proceed to trial. Dionne, 209 F.3d at 709 (App. A-9–A-10). The Eighth Circuit Panel's decision to weigh and discount the evidence offered by Petitioner mimics precisely the Fifth Circuit's improper analysis in Reeves criticized by this Court. As this Court stated therein,

> although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case 'and inference properly drawn therefore...on the issue of whether the defendant's explanation is pretextual.

Reeves v. Sanderson, slip op. at 7-8, 120 S.Ct. at 2106 (citing Burdine, 450 U.S. at 254). See also id. at 2, 120 S.Ct. at 2112 (Ginsburg, J. concurring)("Whether the defendant was in fact motived by discrimination is of course for the finder of fact to decide; that is the lesson of St. Mary's Honor Center v. Hicks." (internal citations omitted)). The Eighth Circuit Panel's usurpation of Petitioner's right to present her evidence of pretext to the factfinder at trial must not be allowed to stand.

D. The Misapplication of Summary Judgment Standards by the Eighth Circuit Panel Majority Conflicts Directly with the Decision of this Court in Reeves.

The impropriety of the Eighth Circuit Panel's usurpation of the proper function of the factfinder at trial is further contrary to the analysis of this Court, in Reeves, regarding the proper application of Rule 50 of the Federal Rules of Civil Procedure. After concluding, in Reeves, that the trier of fact may properly conclude that the employer unlawfully discriminated based on a plaintiff's *prima facie* case and sufficient evidence to find that the employer's asserted justification is false, this Court found that the remaining question was whether Respondent was entitled to judgment as a matter of law, "despite the Court of Appeals' misconception of petitioner's evidentiary burden." Reeves, slip op. at 14, 120 S.Ct. at 2109. Ultimately, this Court affirmed that, "[u]nder Rule 50 a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" Id. This Court also recognized that the standard for summary judgment as a matter of law mirrors the standard for summary judgment under Rule 56. Id. slip op at 15, 120 S.Ct. at 2110. Herein, the Eighth Circuit Panel Majority affirmed the grant by the District Court of Rule 56 Summary Judgment in favor of the Secretary.

This Court further stated, in Reeves, that a court is to review all of the evidence in the record. Moreover, in doing so, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Id., citing Lytle v. Household Mfg. Inc., 494 U.S. 545, 554-555 (1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986);

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 n.6 (1962). This Court elaborated as follows:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Liberty Lobby, supra, at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent the evidence comes from disinterested witnesses."

Reeves, slip op. at 15-16, 120 S.Ct. at 300.

If this Court allows the decision of the Eighth Circuit Panel to stand, Petitioner would be denied all benefit of the proper standard of review, as clarified in Reeves. First, Petitioner has not been fully heard on any issue because she was denied her day in court. Further the Eighth Circuit Panel Majority failed to draw all reasonable inferences in her favor, choosing instead to weigh and discount her evidence as to pretext.[17] Moreover, in stark contrast to the requirement that it disregard all evidence favorable to the Secretary that the jury is not required to believe, the Eighth Circuit Panel, on its own initiative, manufactured an excuse for the Secretary's

[17] This evidence is presented in various documents including, among others, Petitioner's Affidavit, Application, and Deposition; the Position Description posted at the time of Petitioner's application; and within the additional deposition testimony of Delbert Haskell, Georgia Artz and Susan Kartes.

failure to state a legitimate, nondiscriminatory reason, i.e., "honest mistake" or "inadvertence." These are reasons that the Secretary herself did not suggest.

Surely, a trier of fact is not required to believe that the Secretary's action was inadvertent or mistaken. In any event, such a determination belongs exclusively to the province of the factfinder at trial.

II. THE QUESTIONS PRESENTED ARE IMPORTANT

In Reeves, this Court attempted to clarify the McDonnell Douglas framework for analyzing Title VII discrimination cases and the proper standard for judgment as a matter of law (or summary judgment under Rule 56). However, although the decision of this Court, in Reeves, was effective upon issuance, the Eighth Circuit Court of Appeals has failed to heed the guidance provided by this Court therein as it has denied Petitioner's Petition for Rehearing, which relied upon Reeves.

The public has a significant, vested interest in the uniform application of federal law. This important public interest is heightened according to the substantiality of the federal issues raised. Petitioner's case raises federal issues of critical substance. Individuals who have suffered unlawful discrimination must be allowed to present evidence in support of their claims to the factfinder at trial when they have established a *prima facie* case and, further, presented additional evidence of discrimination. Otherwise, Civil Rights legislation is rendered meaningless. This Court has the power to review and overrule federal court decisions that impair the uniform application of federal law among the circuits. Therefore, it is particularly incumbent upon this Court to be vigilant and act affirmatively in order that the Court's recently clarified framework and standards of review for analyzing claims of employment discrimination are not

misapplied in a manner that undermines the consistent application of federal law.

CONCLUSION

The clarification recently provided by this Court, in Reeves v. Sanderson Plumbing Products, Inc, as to the proper application of the McDonnell Douglas framework mandates a reversal or rehearing of the case at bar in light of Reeves. In the instant case, the Majority of a sharply divided Eighth Circuit Panel adopted an approach that conflicts directly with this Court's decision therein.

In the absence of such relief, the Eighth Circuit Panel's decision dangerously implies that (1) perceived inadvertence or mistake suffices to discharge an employer's burden of articulating a legitimate, nondiscriminatory reason for an adverse employment action, and (2) an employee may properly be foreclosed from the right of cross-examination as to the issue of pretext, even when the employee has established a *prima facie* case and submitted additional evidence of pretext.

Thus, Petitioner Marilyn Dionne respectfully requests that this Court grant her Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. She deserves her day in court. Indeed, this Court spoke clearly to that effect in Reeves.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT BY PETITIONER MARILYN B. DIONNE

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Marilyn B. DIONNE, Appellant,

v.

**Donna E. Shalala, Secretary,
U.S. Department of Health and
Human Services, Appellee.**

No. 98-3510.

United States Court of Appeals,
Eighth Circuit.

Submitted Nov. 17, 1999.

Filed April 5, 2000.

Public health nurse with Indian Health Service filed Title VII action alleging race and national origin discrimination in assignment of her classification grade. The United States District Court for the District of North Dakota, Patrick A. Conmy, J., granted summary judgment for government, and nurse appealed. The Court of Appeals, Bowman, Circuit Judge, held that nurse was not discriminated against.

Affirmed.

Lay, Circuit Judge, filed dissenting opinion.

1. Evidence 48

In action by public health nurse with Indian Health Service alleging race and national origin discrimination in assignment of her classification grade, Court of Appeals would take judicial notice of Secretary of Interior's

transmittal containing new qualification standards in Indian *Health Service.*

2. Federal Civil Procedure 2497.1

Where defendant in Title VII action offers nondiscriminatory reason for its action, plaintiff can avoid summary judgment only if evidence considered in its entirety (1) creates fact issue as to whether employer's proffered reasons are pretextual and (2) creates reasonable inference that race was determinative factor in adverse employment decision. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights 153, 377.1

Although Secretary of Interior applied wrong standards to Indian preference applicant for position as public health nurse with Indian Health Service, that did not evidence intent to discriminate on basis of race or national origin, and evidence that three other Native American nurses also accepted lower grade positions in their transfer from clinical nursing to public health nursing and that service unit director's only explanation for applicant's grade was "Because that's the way it is" was insufficient to create reasonable inference that intentional discrimination was factor in grading decision. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Larry B. Leventhal, Minneapolis, MN, argued, for appellant.

Cameron W. Hayden, AUSA, Bismark, ND, argued, for appellee.

Before WOLLMAN, Chief Judge, LAY, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Marilyn Dionne filed this Title VII action alleging race and national origin discrimination in the assignment of her classification grade as a public health nurse with the Indian Health Service, an agency of the Department of Health and Human Services. The District Court[1] granted the Secretary's motion for summary judgment.
We affirm.

I.

Most employment within the federal government, including that at issue in this case, is classified under the General Schedule established by 5 U.S.C. §§ 5101-5115 (1994). Positions are classified according to their difficulty and level of responsibility, and pay rates are set accordingly. For example, grade GS-1 positions, which currently pay an annual salary of up to $20,000, are characterized by the "simplest routine work" under "immediate supervision, with little or no latitude for the exercise of independent judgment," while GS-15 positions, which currently pay an annual salary of up to $117,000, are characterized by "work of outstanding difficulty and responsibility." 5 U.S.C. § 5104.

In this case, Dionne, a member of the Turtle Mountain Band of Chippewa, started work in May 1991 as a GS-7 clinical nurse for the Belcourt Hospital of the Indian Health Service. After a year, Dionne advanced to grade GS-9. In September 1992, Dionne applied for a public health nurse

[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

position within Belcourt Hospital. She apparently was the only applicant for the job, and her application was referred to Delbert Haskell, a personnel staffing specialist for the Indian Health Service. Haskell considered her education, experience, and prior federal government employment and concluded that she only was qualified to be referred for a GS-7 public health nurse position. Under the qualification standards that Haskell used to grade Dionne's application, positions at GS-9 and above required that one year of professional nursing experience must be sufficiently related to public health nursing in both subject matter and grade level. Haskell believed that Dionne's experience as a clinical nurse did not satisfy that standard. Accordingly, Dionne's application was referred at the GS-7 level, and she became a GS-7 public health nurse in June 1993. Dionne need not have accepted the transfer to the GS-7 position (she could have opted to remain a GS-9 clinical nurse); she voluntarily accepted the GS-7 position because of her interest in working in the public health field.

Approximately a year later, Susan Kartes, a non-Indian, was hired as a public health nurse at Belcourt Hospital. Dionne soon learned that Kartes was hired for a GS-11 position. Dionne thought they had equivalent experience and believed she had been discriminated against when placed in the GS-7 position.[2] Dionne filed a complaint with the Equal Employment Opportunity Counselor at Belcourt and later filed a charge of race and national origin discrimination with the Equal Employment Opportunity Commission. The Secretary denied her claims, and Dionne brought suit in the District Court.

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[2] Although the duties of the GS-7, GS-9, and GS-11 public health nurse positions appear to be the same at Belcourt Hospital for all practical purposes, the positions technically have different job descriptions with varying levels of responsibility. *See* App. at 35-44.

II.

Dionne brought this case as a Title VII action. Accordingly, at the District Court, the case was analyzed under the familiar burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny. On summary judgment, the District Court found that Dionne established a prima facie case of disparate treatment, but concluded that the Secretary articulated a nondiscriminatory reason for the grading decision–that Dionne was not qualified for the GS-9 or GS-11 positions. On appeal, Dionne in essence claims that the Secretary applied the wrong qualification standards in grading her public health nurse application. Instead of applying standards specially formulated for Indian applicants as required by the Indian Preference Act, 25 U.S.C. § 472 (1994),[3] Dionne alleges the Secretary applied the general civil service qualification standards then known as X-118 standards.[4]

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[3] For the first time on appeal, Dionne seems to argue that the alleged Indian Preference Act violation constituted an independent claim. We decline to view Dionne's complaint as alleging anything other than a Title VII violation. Dionne's complaint does not mention the Indian Preference Act nor does it seek administrative review of an agency decision as was sought for an alleged Indian Preference Act violation in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979). Furthermore, the District Court only discussed the Indian Preference Act in the context of its discussion of evidence of pretext.

[4] While the record is not a model of clarity on this point, we believe that Dionne is correct on this point. Haskell's affidavit refers to qualification standards for general scheduled positions. And, in response to whether he applied "any special standards that were different from civil service that were meant to reflect her Indian background," Haskell stated, "No." App. at 54-55.

The Indian Preference Act provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed[, without regard to civil-service laws,] to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such position.

25 U.S.C. § 472 (1994); *see also Preston v. Heckler*, 734 F.2d 1359, 1367-69 (9th Cir. 1984) (holding that Office of Law Revision Counsel erred in omitting as obsolete phrase "without regard to civil-service laws" from codification of Indian Preference Act); *Oglala Sioux*, 603 F.2d at 715 (quoting Indian Preference Act in full and relying on phrase "without regard to civil-service laws" in reaching decision).[5] The Indian Preference Act does more than simply require preference in employment decisions for qualified Indian applicants; it "requires the Secretary to establish separate standards for evaluating the qualifications of Indians for employment in the Indian Health Service." *Preston*, 734 F.2d at 1369-70 (rejecting argument that "the Act only requires that Indians be given preference in hiring when they are equally or more qualified than non-Indian applicants"). While *Preston* was decided by the Ninth Circuit and thus is not binding on us, the Secretary has undertaken to comply with its mandate to establish separate standards for Indian applicants. Furthermore, in *Oglala Sioux*, on which *Preston* relies, we held that the Indian Preference Act forbids the

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[5] Despite contrary indications from two courts of appeals, the 1994 version of the United States Code still omits as obsolete "without regard to civil-service laws" from the codified version of the Indian Preference Act.

"blind transference of general Civil Service principles." *Oglala Sioux*, 603 F.2d at 716 (holding that general civil service conflict-of-interest regulation did not apply to tribal member).

Although *Preston* and *Oglala Sioux* forbid the "blind transference" of civil service standards, those decisions emphasized that the general civil service standards nevertheless may have significant bearing on the appropriate standards for Indian applicants:

> If, after giving full weight to the unique experience and background of Indians, as required by statute, the Secretary concludes that the only proper qualifications for a particular position are those that have already been adopted as a part of the civil service regulations, her separate and independent adoption of the same standards would not be unlawful.

Preston, 734 F.2d at 1372; *accord Oglala Sioux*, 603 F.2d at 716-17. As in *Preston*, we are mindful that the Secretary must adopt standards that recognize "the strong federal policy of ensuring that health services provided to Indians are of the highest quality." *Preston*, 734 F.2d at 1371-72.

After the Ninth Circuit's decision in *Preston*, the Secretary established a steering committee to review the qualification standards in the Indian Health Service and to recommend qualification standards for Indian preference applicants. *See* Plan for the Review of Qualification Standards for Indians in the Excepted Service in the Indian Health Service, 49 Fed.Reg. 37,474 (1984). Among the steering committee's first actions was to identify a limited number of occupations for a pilot study. Public health nursing, also known as community health nursing, was among those occupations selected. In December 1986, the Secretary transmitted new qualification standards for Indian preference applicants to those occupations in the pilot study, including

public health nurse positions. *See* Indian Health Service, Excepted Service Qualification Standards for Community Health Nurse Positions, Transmittal Sheet No. 1 (1986). These new qualification standards for Indian preference applicants to public health nurse positions are self contained and make no explicit reference to the X-118 standards. Six years later, in December 1992, the Secretary gave notice that the Indian Health Service "intends to adopt the [U.S. Office of Personnel Management] qualification standards (X-118 standards) for all personnel series not yet covered by excepted service standards published for Indian applicants." Plan for the Completion of the Review of Qualification Standards for Indians in the Excepted Service, 57 Fed.Reg. 57,-070 (1992).[6] Because public health nurse positions were covered by new qualification standards for Indian preference applicants—namely, the December 1986 transmittal—the December 1992 notice and thus the X-118 standards have no bearing on this case.

[1] Unfortunately, the District Court was unaware of the new qualification standards contained in the December 1986 transmittal.[7] The District Court, citing the December 1992

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[6] In addition, the Secretary provided for the use of two selective factors or quality ranking factors for Indian applicants: "[a]bility to speak and interpret the language of the Native American population to be served" and "[k]nowledge of the culture, customs, and beliefs of the Native American population to be served." 57 Fed.Reg. at 57,071. As we understand these terms, selective factors are qualification standards that an agency may use in deciding whether applicants are basically qualified for a position. On the other hand, an agency must use the X-118 standards in deciding whether applicants are basically qualified for a position. Agencies use quality ranking factors to distinguish between qualified applicants. For example, all else being equal, an applicant who could speak and interpret the language of the Native American population to be served would rank higher than an applicant who could not.

[7] The parties are responsible for this omission. Apparently, neither party brought either the December 1986 transmittal or the December 1992 notice to the attention of the District Court. The court found the December 1992 notice on its own. That no one seemed to fully understand the

notice, concluded that the Secretary correctly applied the X-118 standards to Dionne's application. On this point, the District Court erred as a matter of law, inasmuch as the X-118 standards were not the standards the Secretary should have applied.

[2] But, as the District Court correctly pointed out, Dionne's rebuttal to the Secretary's nondiscriminatory reason that she was not qualified must satisfy a two part test: "[P]laintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [race] was a determinative factor in the adverse employment decision." *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir.1996) (reconciling this Court's decisions after *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). "[T]he overall strength of [the] evidence must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by discriminatory animus." *Id.* at 1336.

[3] Dionne's only evidence of intentional discrimination is that three other Native American nurses also accepted lower grade positions in their transfer from clinical nursing to public health nursing and that the service unit director's only explanation for her grade was "Because that's the way it is." App. at 28. We conclude, as the District Court did, that this evidence is insufficient as a matter of law to create a

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complex administrative history of these qualification standards, together with the unusual procedural circumstances of the summary judgment order, which we need not describe, somewhat mitigate their failure to bring the December 1986 transmittal to the attention of the District Court. In any case, we treat Dionne's motion to supplement the record to include the December 1986 transmittal as a filing under Rule 280) of the Federal Rules of Appellate Procedure, and we take judicial notice of it. We note that on appeal the Secretary admits that the standards contained in the December 1986 transmittal applied to Indian applicants during the period when Dionne's application for a public health nurse position was pending.

reasonable inference that intentional discrimination was a factor in the grading decision.

We are left only with evidence that the Secretary applied the wrong standards to Dionne's application. In other words, Dionne only has evidence that the Secretary's nondiscriminatory reason that she was not qualified was based on the Secretary's application of the X-118 standards rather than the Indian Preference Act standards as established in the December 1986 transmittal. There is absolutely no evidence that the application of the wrong standards was anything but an honest mistake.[8] The Secretary's stated reason for the GS-7 classification of Dionne was, in fact, the Secretary's actual reason. We do not believe this evidence can show pretext or still less that it can give rise to a reasonable inference of intentional discrimination. Without more, the evidence only shows that the Secretary applied the wrong standards in the context of a complex administrative system—a system so complex that even the parties to this lawsuit failed to bring the December 1986 transmittal to the attention

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[8] Judge Lay's dissent characterizes the inadvertent application of the wrong standards as "unlawful." There is, of course, a sense in which that is true. In a case brought pursuant to the Administrative Procedure Act seeking review of the Secretary's decision, Dionne might well prevail on the theory that, since the wrong standards were applied, the decision was "not in accordance with law." 5 U.S.C. § 706(2)(A) (1994). But this is a disparate-treatment Title VII case, and to win such a Title VII case a plaintiff must be able to show that the employer intentionally discriminated against the plaintiff on account of race, color, religion, sex, or national origin. Much like the example in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), in which racial discrimination was described as an "improper" reason under Title VII, but not under the Age Discrimination in Employment Act, the Secretary's use here of the wrong standards was improper under the qualification standards promulgated by the agency in accordance with the Indian Preference Act, but not under Title VII. On the record before us, the application of the wrong standards was merely inadvertent and simply a mistake of law. Accordingly, it is not evidence of an intent to discriminate.

of the District Court. That the December 1986 transmittal standards should have been applied because Dionne is a tribal member does not make the Secretary's inadvertent failure to do so somehow based on race or national origin. The Supreme Court has held that the application of Indian preference does not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *See Morton v. Mancari,* 417 U.S. 535, 551-55, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).[9] Dionne cannot have it both ways; the Secretary's mistaken failure to apply the standards also does not amount to discrimination. Of course, it is possible that a failure to apply the Indian preference standards could be motivated by discriminatory animus. But here, we simply have no evidence that was the case. Without such evidence, Dionne's Title VII claim must fail. Accordingly, we affirm the judgment of the District Court.

LAY, Circuit Judge, Dissenting.

I respectfully submit that the majority's affirmance of the district court's grant of summary judgment in favor of the Secretary of the Department of Health and Human Services ("Secretary") is egregiously wrong. It is in direct opposition to the law announced by the Supreme Court of the United States.

This court cautioned in 1979 that the IPA forbids the "blind transference of general Civil Service principles" to Indian hiring. *Oglala Sioux Tribe of Indians v. Andrus,* 603 F.2d 707, 716 (8th Cir.1979). Only five years later, the Ninth Circuit stated that the IPA "requires the Secretary to adopt

[9] The Indian Preference Act is not an antidiscrimination law. "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the [Bureau of Indian Affairs] more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." *Morton,* 417 U.S. at 554, 94 S.Ct. 2474.

separate and independent standards for evaluating the qualifications of Indians for employment in the Indian Health Services...." *Preston v. Heckler,* 734 F.2d 1359, 1371 (9th Cir.1984). Additionally, the *Preston* court emphasized that "positions in the Indian Health Service are exempt from the civil service standards." *Id.* at 1372. In 1986, responding to *Preston*, the Secretary promulgated the Indian Health Service's Qualification Standards for Excepted Service ("1986 standards"). These standards expressly establish separate criteria for the employment of Indians in certain excepted service positions, including that of public health/community health nurse. Further, the 1986 standards preempt the general civil service qualification standards, known as the X-118 standards. At the time of Marilyn Dionne's application for the public health nurse position, the 1986 standards were in effect, and her application should have been evaluated under these standards, as well as the IPA.

Notwithstanding these legal precedents and the Secretary's own 1986 standards the Secretary unlawfully and deliberately applied the general civil service standards to Dionne's application. In so doing, the Secretary determined that Dionne was only qualified for a GS-7 position because, *under the general civil service standards,* she lacked the required year of specialized service in public health nursing. Thus, in order to transfer into the new position and further her work within her tribal community, Dionne was required to accept a pay scale demotion.[10]

Today's majority opinion compounds the Secretary's unlawful action. The majority acknowledges that the

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[10] The Secretary's grading decision was made despite Dionne's extensive nursing background. At the time of her transfer, Dionne was licensed as a registered nurse by the State of North Dakota, had years of experience in specialized services working as a clinical nurse at Belcourt Hospital, and had been promoted from a GS-7 to a GS-9 in that position. Significantly, her prior work consisted of extensive and diverse experience within her tribal community.

Secretary's use of the general civil service standards was *unlawful*; nevertheless, it accepts inadvertence as an excuse for such action and concludes that the Secretary's conduct was "an honest mistake" rather than a subterfuge for discrimination. The majority's reasoning is flawed.

A. *Legitimate, Nondiscriminatory Reason*

In Title VII cases, after a plaintiff establishes a prima facie case of discrimination,[11] the burden of production shifts to the employer to articulate a "*legitimate,* nondiscriminatory reason" for the employment action. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (emphasis added). Under this analysis, once a prima facie case is established, a presumption arises that the employer unlawfully discriminated against the employee. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the employer fails to rebut the presumption by meeting its burden, the plaintiff is entitled to judgment as a matter of law. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 509, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

In *Burdine,* the Supreme Court stated, "the employee's prima facie case of discrimination will be rebutted if the employer articulates *lawful* reasons for the action...." *Burdine,* 450 U.S. at 257, 101 S.Ct. 1089 (emphasis added). Additionally, Black's Law Dictionary defines the adjective "legitimate" as "[c]omplying with the law; lawful." BLACK'S LAW DICTIONARY 912 (7th ed.1999). Thus, by usage and definition, an unlawful or illegal ground cannot serve to satisfy an employer's burden of articulating a "*legitimate,* nondiscriminatory reason."[12] In this matter, after

[11] The district court held, and the majority accepts, that Dionne established a prima facie case.

[12] This discussion of the inherent failure of unlawful reasons should not be taken out of context. In *Hazen Paper Co. v. Biggins, 507* U.S. 604,

Dionne established her prima facie case, the Secretary's proffered "legitimate, nondiscriminatory reason" for its action rested solely on the conclusion that she was not qualified for a higher grade under the general civil service qualification standards. The majority now concedes that the Secretary acted unlawfully in applying these standards; yet it allows such illegality to stand. Such a conclusion belies logic.

Additionally, the majority's opinion overlooks what is perhaps the best known legal maxim—"ignorance of the law is no excuse." While this maxim is one of general applicability, it must be applied more acutely to those who are presumed to know the law and are trusted to apply it. *See Screws v. United States*, 325 U.S. 91, 129, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (Rutledge, J. concurring) ("[Ignorance of the law] is less an excuse for [individuals] whose special duty is to apply it, and therefore to know and observe it."). In this case, the Secretary was charged by Congress to promulgate specific employment standards for Indians, which it did. The Secretary then failed to apply its own standards in the present case. If the time-tested maxim is to retain any vitality, it minimally must mean that knowledge of the IPA and of one's own promulgated standards is to be imputed to the Secretary. Once such knowledge is properly attributed, it necessarily follows that the Secretary deliberately chose to ignore the law and applied unlawful criteria to Dionne's application.

612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Supreme Court stated "it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA." Thus, the Court has noted that articulation of an illegal but true reason, unrelated to the claim at issue, may satisfy an employer's burden. However, the discussion in *Hazen* stands in contrast to the instant facts. Here the articulated reason was lack of qualification under the X-118 standards. The very application of such standards directly violates laws designed to give preferential treatment to Native Americans in employment. Such illegality is intricately related to the Title VII claim at stake.

Professing ignorance does not transform such a choice into inadvertence or an innocent mistake, and to allow such is to invert the legal maxim.

On the record before us, the Secretary failed to articulate a legitimate, nondiscriminatory reason for the employment decision; thus, Dionne's prima facie case and its corresponding presumption remain unrebutted. Consequently, the district court should have granted judgment as a matter of law in favor of Dionne. In failing to do so, the district court, and now this court, permit a governmental agency to escape liability under Title VII by pleading ignorance of its own rules, legislation, and of anti-discrimination laws. The IPA and the 1986 standards were designed to overcome the historically recognized negative effects of non-Indian control of Indian affairs and to facilitate the return of control to Indians. Title VII was designed, in part, to remedy race and national origin discrimination in employment. Today's holding undermines each of these objectives by simultaneously acknowledging the applicability of the laws and standards while excusing their violation because of alleged ignorance. Such strained analysis surely must fail.

B. *Pretext*

Notwithstanding the above discussion, the majority accepts the Secretary's assertion of Dionne's lack of qualification as a legitimate, nondiscriminatory reason and proceeds to analyze whether Dionne proved pretext under the third prong of *McDonnell Douglas*. Although I disagree for the reasons previously stated, for purposes of discussion I will assume that an unlawful, nondiscriminatory reason can suffice to carry the employer's burden in a pretext case.

Here, the Secretary's asserted nondiscriminatory reason was lack of qualification; it is undisputed, however, that the Secretary used unlawful standards in determining Dionne's qualifications. Consequently, the alleged nondiscriminatory

reason serves as evidence of pretext because the reason given was false and could not be the true reason for her lack of promotion.

As the Supreme Court observed in *Hicks*:

> (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," and (2) "it is not enough . . . to *dis* believe the employer." Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, *there must be a finding of discrimination.*

Hicks, 509 U.S. at 511 n. 4, 113 S.Ct. 2742 (emphasis in original) (internal citations omitted).

The majority concedes in the closing lines of its opinion: "it is possible that a failure to apply the Indian preference standards could be motivated by discriminatory animus." This being so, the Secretary's motivation or intent is a question for the jury to decide. As it stands, two reasonable inferences can be drawn from the evidence: (1) the Secretary's missapplication of the law was inadvertent or a mistake; or (2) the Secretary's misapplication was motivated by discriminatory animus.

At the very least, the plaintiff has demonstrated, and this court now agrees, that the employer's articulated reason was not the true reason and the trier of fact should then determine whether a mistake or discriminatory animus motivated the Secretary's action. This is the typical pretext case. It seems highly plausible that plaintiff's counsel, through effective cross-examination of the Secretary, could expose the incredulity of a high ranking government official's claim that he or she was not aware of the applicable laws or standards, and that failure to apply them was merely a good faith mistake. As the *Burdine* Court noted, "there may be some cases where the plaintiff's initial evidence, combined with

effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine*, 450 U.S. at 255 n. 10, 101 S.Ct. 1089.

Under these circumstances, even if one assumes this is a pretext case, the inferences to be drawn from the Secretary's claim should be drawn by a trier of fact and not the court. In all of the precedents of this court as well as those of the United States Supreme Court, where the employer's articulated reason is shown to not be the true reason, then pretext is deemed to have been shown and the trier of fact must be given the opportunity to infer whether the given reason hides intentional discrimination. Therefore, I conclude, even under a pretext analysis, this case should not have been dismissed at the summary judgment stage.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Marilyn B. Dionne,	)	
	)	
Plaintiff,	)	
vs.	)	Civil No. A4-96-130
	)	
Donna E. Shalala, Secretary of	)	
United States Department of	)	
Health and Human Services,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is now before the Court on Defendant's ("Secretary") Motion for Summary Judgment. Plaintiff ("Marilyn") responded in opposition on December 11, 1997. Defendant served a reply brief on June 10, 1998. After careful consideration of the briefs, relevant case law and the record as a whole, the Court issues the following opinion.

I. Background

Marilyn, a Native American Indian, is a member of the Turtle Mountain Band of Chippewa. She is employed as a nurse with the Public Health Service ("PHS", formerly known as the Indian Health Service: IHS) hospital on the Turtle Mountain Reservation at Belcourt, North Dakota. Marilyn earned her L.P.N. degree from the Lide Region Junior College in 1976, an Associate of Science degree in 1989 from Turtle Mountain Community College and her Baccalaureate degree in nursing from the University of Mary in May of 1991. She passed her board exam to be licensed as a

Registered Nurse ("R.N.") with the state of North Dakota in August of 1991. Marilyn began her nursing career with the PHS on May 19, 1991, when she accepted a position as a temporary clinical nurse at a GS-7 salary. The PHS is part of the federal agency under the control of the Secretary. She was hired into a permanent clinical nurse position on August 25, 1991. Marilyn was promoted, on May 31, 1992, to a GS-9 clinical nurse.

On September 14, 1992, Marilyn made application for PHS Vacancy Announcement No. 92-03-VAR, an open continuous announcement, for Community Health Nurse, a GS-7 through 12 position, at the Belcourt hospital. The announcement stated that hiring preference to eligible applicants would be afforded in accordance with federal law mandating Indian Preference. Marilyn updated her application on December 28, 1992, to expand her employment request from consideration of only GS-9 positions, but to include consideration for GS-7 positions. Marilyn was selected for and accepted an appointment to a community health nurse position at a GS-7 step 7 scale, which resulted in a net loss of $875.00 from the pay she received as a clinical nurse, GS-9 step 2.

On May 15, 1994, PHS hired a non-Indian female, Susan Kartes ("Susan"), to the position of community health nurse at a pay grade of GS-11. On July 1, 1994, Marilyn filed a complaint with her Equal Employment Opportunity Counselor at PHS, protesting Marilyn's initial placement at a lower pay scale than that offered to Susan, as a community health nurse. After receiving the administrative report from the EEO Counselor, Marilyn filed a charge of race and national origin discrimination with the Equal Employment Opportunity Commission ("EEOC"), on November 18, 1994. Following an investigation by the EEOC, her claims were denied, in August of 1996. Marilyn received her right-to-sue notice and timely filed suit in this Court on November 22, 1996, stating a claim of race and national origin

discrimination based upon the disparate treatment theory of failure to promote. Marilyn's specific claim is that PHS discriminated against her by failing to properly apply Indian Preference standards in classifying her for a lateral transfer from clinical nurse to community health nurse, resulting in a reduced pay scale, GS-9 to a GS-7, while a similarly situated non-Indian was hired as a community health nurse at a greater rate of pay, GS-11.

II. Standard for Summary Judgment

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy. Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337, 1339 (8th Cir. 1989). The evidence is viewed in the light most favorable to the nonmoving party. Id. at 1339. Thus, in determining whether a genuine issue has been raised, the inferences to be drawn from the underlying facts revealed in the affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion. See, e.g., united States v Diebold, 82 S.Ct. 993, 994 (1962). The mere existence of some alleged factual dispute, however, will not defeat an otherwise properly supported motion for summary judgment if there is no genuine issue of material fact. Id. If the moving party meets its initial burden of production with credible evidence which convincingly shows there is no genuine issue of material facts, the opposing party must come forward with specific facts that demonstrate a genuine issue for trial. Elbe v. Yankton Independent School District No. 1, 714 F.2d 848, 850 (8th Cir. 1983). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). To defeat a motion for summary judgment, the opposing party must show that a genuine dispute about a material fact exists.

III. Analysis

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Under Title VII, an "employer" is defined as "a person engaged in any industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person." 42 U.S.C. § 2000e(b) (1996). It is undisputed that the PHS qualifies as an employer under federal law for the purposes of regulation by employment discrimination legislation. It is also undisputed that Marilyn is a member of a protected class, defined by her race, Native American Indian, and/or national origin, enrollment in the Turtle Mountain Band of Chippewa.

IIIa. Failure to Promote

To maintain a disparate treatment claim based upon failure to promote, Marilyn must establish a *prima facie* case of discrimination: (1) she belonged to a protected class; (2) she was qualified and applied for promotion to an available position; (3) that despite her qualifications she was denied the position; and, (4) that her employer promoted an employee of similar qualifications, who was not part of the protected group. Patterson v. McLean Credit Union, 109 S.Ct. 2363,

2377-2378 (1989); and, McCullough v. Real Food. Inc., 140 F.3d 1123, 1126 (8th Cir. 1998).

It is undisputed that Marilyn is a member of a protected class based upon her race and national origin. Marilyn was qualified and applied for the open position of community health nurse at Belcourt hospital. PHS denied Marilyn a position above grade GS-7; and hired Susan, a non-Indian, at a GS-11 grade. Marilyn has sufficiently established the elements of a *prima facie* case of disparate treatment. Patterson, 109 S.Ct. 2363, 2377-2378 (1989). Under the burden shifting framework established by McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817 (1973), the Secretary must rebut the presumption of discrimination with evidence "that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Burdine, 101 S.Ct. 1089, 1094. The Secretary, in classifying Marilyn for an appropriate pay grade, applied the nursing qualification standards established by PHS in a manner in which "[r]ace has no bearing, neither does national origin." Aff. Delbert Haskell, Personnel Staffing Specialist, PHS (Mar. 3, 1995). Marilyn's application was rated in accordance with the Office of Personnel Management ("OPM") Handbook X-118 Qualification Standard and PHS Qualification Standards for GS-610, community health nurse positions:

> As a Staffing Specialist, I rate applicants in reference to our qualification standards. I rated Marilyn Dionne's application when she applied for a vacant position of Community Health Nurse. Our standards state that applicants for Community Health Nurse at grades GS-9 and above must have specialized experience of at least one year comparable to the next lower grade in that specialty. It was my evaluation that Ms. Dionne's experience as a Clinical Nurse did not provide that. Experience has

> to be specialized and specific to Community Nursing. Licensed Practical Nursing (LPN) experience, which Ms. Dionne had, can only be substituted up to the GS-5 level. The level of her experience in Community Health Nursing, is the only consideration taken in arriving at her grade level.
>
> I also rated Ms. Susan Kartes. She had a Bachelors degree in Nursing and at least three years experience in Community Health Nursing. As such, she qualified for the GS-11 grade. In terms of grade level, that is the only criteria for rating applicants.

Aff. Delbert Haskell, Personnel Staffing Specialist, PHS (Mar. 3, 1995). The Secretary has rebutted the presumption created by the *prima facie* case by articulating a nondiscriminatory reason for the employment decision. Buchholz v. Rockwell Int'l Corp., 120 F.3d 146, 150 (8th Cir. 1997).

The burden has shifted back to Marilyn to show that the Secretary's proffered reasons are pretextual, as dictated by the third-step of the McDonnell Douglas framework. 93 S.Ct. 1817 (1973). This rebuttal must satisfy a two part test. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996). "[P]laintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [intentional discrimination] was a determinative factor in the adverse employment decision." Rothmeier, at 1336-1337.

IIIb. Pretext

Marilyn counters that an issue of fact is present as to whether the Secretary's reasons are pretextual. Marilyn

argues that pretext is evident by the Secretary failure to properly apply Indian Preference in classifying Marilyn's initial pay grade as a community health nurse. The Indian Preference Act provides "Standards for Indians appointed to Indian Office":

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed [without regard to civil-service laws,] to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appoint to vacancies in any such positions.

25 U.S.C. § 472 (1998). The United States Supreme Court has upheld the Indian Preference Act as a valid mechanism to remedy discrimination which has existed against Native American Indians. Morton v. Mancari, 94 S.Ct. 2474 (1974). The Appellate Court for the Ninth Circuit, in reviewing the Secretary's failure to comply with the Indian Preference Act, mandated that the Secretary adopt standards that were separate and independent from the generally applicable civil service, for evaluating the qualifications of Native American Indians for employment with the PHS; "standards that give sufficient weight to the unique experience and background of Indians, including their superior knowledge of Indian needs and problems." Preston v. Heckler, 734 F.2d 1359, 1371 (9th Cir. 1984).

> If, after giving full weight to the unique experience and background of Indians, as required by statute, the Secretary concludes that the only proper qualifications for a particular position are those that have already been adopted as part of the civil service

> regulations, her separate and independent adoption of the same standards would not be unlawful.

Preston at 1371. In compliance with the Preston mandate, the Secretary has established qualification standards for Native American Indians, who apply for jobs with the PHS and claim Indian Preference.

> The Secretary has determined that because the United States OPM standards were recommended, no further review is required. The standards review that has been made over the last several years has resulted in no substantive changes. One recommendation that has been incorporated in all the standards developed is to allow the use of selective factors and quality ranking factors, when appropriate, that pertain to knowledge, skills and abilities relating to Indian language and/or culture.

Plan for the Completion of the Review of Qualification Standards for Indians in the Excepted Service, 57 Fed. Reg. 57,070-01 (1992). The Secretary adopted two selective/quality ranking factors for evaluation of PHS applications by Native American Indians, claiming Indian Preference: (a) Ability to speak and interpret the language of the Native American population served; and, (b) Knowledge of the culture, customs, and beliefs of the Native American population to be served. 57 Fed. Reg. 57,070. These selective/quality ranking factors augment the OPM qualification standards (X-118 standards) as adopted by the Secretary to classify candidates for the position of community health nurse with the PHS. Id. at 57,071. Marilyn argues that Indian Preference requires the Secretary to give credit for community-health nursing experience obtained while Marilyn worked as a L.P.N. The Secretary's disallowed Marilyn's L.P.N. work experience, as this qualification could not be

considered for the positions of community health nurse GS-7 and grades above. Guidelines for Applying OPM Qualification Requirements for Community Health Nurse Positions, para. A(1); Aff. Delbert Haskell.

This Court is unable to conclude that the Secretary's adoption of qualifications standards for the position of community health nurse and the employment of those qualification standards in rating Marilyn's application, are contrary to the Indian Preference Act or to the Circuit Court's mandate in Preston. See, 25 U.S.C. § 472 (1998); Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984). Accordingly, this Court concludes no reasonable trier of fact could find issue as to whether the Secretary's proffered nondiscriminatory reason is pretextual. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996).

IIIb. Intentional Discrimination

Under the second part of the Rothmeier test, Marilyn must present evidence creating a reasonable inference that the Secretary's nondiscriminatory reasons were actually pretext for impermissible discrimination. Rothmeier at 1337. The Supreme Court has ruled that in a pretext case, a plaintiff must establish that "both the reason was false, and that discrimination was the real reason." St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2752 (1993). As circumstantial evidence of intentional discrimination, Marilyn avers that three other Native American Indian female nurses have had to "accept demotion in order to make the transition from Clinical Nursing to Public [community] Health Nursing," and that, "In order to make the change [from clinical nurse to community health nurse], I was told by Mr. Clarence Frederick, Service Unit Director, that I would have to take a demotion to GS-7, 'Because that's the way it is.'" There was no other explanation." Aff. Marilyn Dionne (Aug. 2, 1994). Even to accept these assertions as true, this Court finds such

evidence insufficient to support any reasonable inference that the Secretary's application of the qualification standards in classifying Marilyn as a GS-7 community health nurse, was based upon intentional discrimination. McCullough v. Real Foods, Inc., 140 F.3d 1123, 1128 (8th Cir. 1998).

IV. Conclusion

The Secretary has adopted qualification standards that comply with the Indian Preference Act and the mandate of the Preston court. The Secretary's application of these qualification standards in classifying nurse applicants with the PHS, is in accordance with the Indian Preference Act. The Secretary's disallowance of L.P.N. work experience in classifying community health nurse applicants for positions above the GS-7 level, is not an impermissible act of employment discrimination.

For the reasons stated above, the Court hereby **ORDERS** that Defendant's Summary Judgment Motion (Docket No. 18) is **GRANTED**; that Plaintiff's Complaint (Docket No. 1) is **DISMISSED with prejudice**; that each party is to bear its own costs; and, that trial on this matter, set for Monday, July 7, 1998, in Minot, North Dakota, is **CANCELED**.

Let Judgment Be Entered Accordingly.

Dated this 22nd day of June, 1998.

s/
Patrick A. Conmy; District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Marilyn B. Dionne,	)	
	)	
Plaintiff,	)	
vs.	)	Civil No. A4-96-130
	)	
Donna E. Shalala, Secretary of	)	
United States Department of	)	
Health and Human Services,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Now before the Court is Plaintiff's motion for reconsideration of summary judgment, which this Court shall treat as a motion for relief from judgment, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Marilyn Dionne requests the Court to reconsider its order granting summary judgment in favor of the government, and to permit additional briefing on the matter. Defendant opposes the motion.

Upon reviewing the Parties' briefs, applicable case law and the record as whole, this Court is of the firm opinion that the Order for summary judgment is well-founded; that neither of the Parties have been unduly prejudiced by procedural inconsistencies arising in this case; that the Secretary's hiring, classification and grading system with its impact upon Plaintiff, complies with the Indian Preference Act and the mandate of the Preston court. 25 U.S.C. § 472 (1998); Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984). Plaintiff's motion for relief from judgment (Docket No. 39) is **DENIED**.

SO ORDERED.

Dated this 29th day July, 1998.

s/
Patrick A. Conmy; District Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-3510NDBI

Marilyn Dionne,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
Donna Shalala, et al.,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. Judge McMillian and Judge Richard S. Arnold would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

June 27, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

INDIAN HEALTH SERVICE

EXCEPTED SERVICE

QUALIFICATION STANDARDS

FOR

POSITIONS UNDER THE GENERAL SCHEDULE

TRANSMITTAL SHEET NO. 1

December 1986

On June 7, 1984, a U.S. Court of Appeals decision was made which affects hiring practices for American Indians and Alaska Natives in the Indian Health Service (IHS). This court decision is referred to as the Preston Case. It requires the Department to establish qualification standards for Indians who apply for jobs in the Excepted Service in IHS. Positions in the IHS are considered Excepted Service when they are filled under 5 CFR 213.3116(b)(8) by Indians entitled to Indian preference.

This transmits the following qualification standards for American Indian and Alaska Natives who apply for jobs in the Excepted Service in the IHS:

Introduction to the Indian Health Service Excepted Service Qualification Standards for Positions Under the General Schedule

Social Worker Series, GS-185

Community Health Nurse Series, GS-610

Dental Assistant Series, GS-681

EXCEPTED SERVICE

QUALIFICATION STANDARDS

FOR

COMMUNITY HEALTH NURSE POSITIONS

IN

INDIAN HEALTH SERVICE

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
HEALTH RESOURCES AND SERVICES
ADMINISTRATION
INDIAN HEALTH SERVICE

December, 1986

A-32

ESTABLISHMENT OF QUALIFICATION STANDARDS

Approval:

I hereby approve the establishment of the attached qualification standards for the Community Health Nurse Series, GS-610 for use in the excepted service positions in the Indian Health Service.

s/ _____ 12-11-86

Everett R. Rhoades, M.D. Date
Assistant Surgeon General
Director, Indian Health Service

Concur:

s/ _____ 3-18-87

Thomas S. McFee Date
Assistant Secretary for Personnel Administration

INDIAN HEALTH SERVICE
QUALIFICATION STANDARD
EXCEPTED SERVICE

NURSE SERIES GS-610
(p. 1)

Community Health Nurse
GS-5 and above

Description of Work

This series includes supervisory and nonsupervisory positions which apply a professional knowledge of nursing. The community health nurse advises and provides nursing services to individuals, families, and to the community as a whole throughout a rural or urban area. Health promotion, health maintenance, health education, coordination and continuity of care are utilized in a holistic approach to the family, the group and the community. They function as client advocates.

Basic Registration Requirements

Applicants for community health nurse positions must have active, current registration as a professional nurse in a State, District of Columbia, the Commonwealth of Puerto Rico, or a Territory of the United States.

An applicant who has within the past 12 months, graduated from a school of professional nursing approved by a legally designated State approving agency at the time of graduation, may be appointed at the entrance grade level for which qualified pending attaining State registration/licensure as a professional nurse within 6 months after appointment. No person appointed pending registration/licensure may be

retained beyond 6 months or promoted if registration/ licensure has not been attained.

Basic Educational Requirements for all Community Health Nurse Positions

Candidates for positions at all grades must meet one of the following requirements:

A. Graduation with a bachelor's or higher degree in nursing from a school of professional nursing, approved by the legally designated State accrediting agency at the time the program was completed by the candidate. This is the preferred/ordinary way of qualifying, provided the course work included the study of community health nursing concepts. Candidates who are not bachelor of science in nursing (ESN) graduates may be considered for these positions under B., C., or D. below provided their record of experience clearly demonstrates a good knowledge of community health nursing concepts, programs and techniques.

B. Graduation from a 3-year (at least 30 months) diploma program of professional nursing approved by the legally designated State accrediting agency at the time the program was completed by the candidate.

C. Graduation from an associate degree program or other program of at least 2 years in a school of professional nursing approved by the legally designated State accrediting agency at the time the program was completed by the candidate.

D. Graduation from a school of professional nursing (including foreign schools), of at least 2 years in length other than one covered by A, B, or C above, provided

that the professional nurse training and the nursing knowledge acquired therefrom are substantially comparable and equivalent to that of graduates of an approved school as described above. Comparability should be evaluated by a State Board of Nursing. Registration as defined above meets this requirement.

NOTE: Successfully completed college level course work in nursing; the behavioral, physical or biological sciences related to nursing; nutrition; public health; and maternal and child health in excess of the minimum basic education requirement may be substituted for professional nursing experience at the rate of 1 academic year (i.e., 30 semester hours of undergraduate work) of appropriate education for 9 months of professional nursing experience in establishing eligibility for the GS-5 level. Tutorial or remedial work cannot be substituted.

Education and Experience

Candidates for grades GS-7 and above must have had either professional experience or graduate education (or an equivalent combination of both) in addition to meeting the basic educational requirements for community health nurse positions. Such professional experience must have been in nursing. Such graduate education must have been in nursing with a concentration in community health or closely related non-nursing fields directly applicable to the requirements for the position to be filled (such as masters in public health).

This experience or education must have equipped the candidate with the knowledge and ability to perform fully the work of the position for which being considered.

1. Experience

The required amounts of professional experience are:

Grade	Associate degree program or diploma program of less than 30 months (years)	Diploma program of 30 months or more (years)	Baccalaureate degree program (years)
5	1	0	0
7	2	1	1
9	3	2	2
11	4	3	3

Professional Experience

This is experience which demonstrates knowledges, skills, abilities and personal characteristics (KSAPs) as listed below. In order for the experience to be credited as professional experience, the applicant must have all of the KSAPs listed for that grade level.

THE KNOWLEDGE OF COMMUNITY HEALTH NURSING PRINCIPLES, THEORIES AND PRACTICES WILL BE MET PRINCIPALLY THROUGH THE BACHELOR'S OF NURSING DEGREE.

For the GS-5 level:

(1) K - general nursing principles;

(2) A - to apply current nursing procedures and techniques of patient care;

(3) K - client teaching; and

(4) P - of acceptance and sensitivity of varied life styles, healing methods and practices.

As examples, these knowledges, skills, abilities, and personal characteristics may have been gained as follows (the number in parenthesis indicates which KSAP(s) it relates to):

- Worked in a general medical clinic providing nursing care to a variety of patients with various health problems (1, 2)
- Worked in a medical/surgical care unit providing direct patient care to adults and geriatric patients (1, 2)
- Assisted in staffing and providing care for patients in a sexually transmitted disease clinic (2)
- Assisted in caring for patients in clinic setting for clients of diverse cultural and educational backgrounds, e.g., free urban clinic (2, 3, 4)
- Conducted diagnostic health screening programs and clinics in the school setting (2)
- Participated in COSTEP/Extern work experience in an IHS Community Health Nursing Program (2, 4)
- Assisted in health education program in an outpatient setting (3)
- Worked in an outpatient clinic providing patients with examples of how they might improve their health status and used teaching aids/models to explain about specific disease processes (3)
- Worked in a general medical clinic and taught patients how to give themselves insulin injections, identify insulin reactions and what to do about them (3)
- Served as a tribal health board member (4)

- Assisted clients in identifying and contacting appropriate resources to meet their health care needs (4)

For the GS-7 level:

(1) K - Community health nursing principles, theories and practices;

(2) S - in application of current nursing procedures and techniques of patient care;

(3) K - of client teaching/counseling techniques; and

(4) P - acceptance and sensitivity of varied life styles, healing methods, and practices.

As examples, these knowledges, skills, abilities, and personal characteristics may have been gained as follows (the number in parenthesis indicates which KSAP(s) it relates to):

- Teaching patients in the hospital and clinic (2, 3)
- Caring for patients of all ages assessing problem, intervening with the solution and evaluating the solution (2)
- Working speciality clinics, i.e., well child, prenatal, diabetic, etc. (2)
- Triaging of injuries/illnesses in outpatient clinic (2)
- Instituting measures to improve health education in the outpatient deportment (3)
- Involved in providing all patient care; obstetric, newborn, tuberculosis, neuro-psychiatric, alcoholic, medical, surgical and pediatric (2, 3)
- A tribal member who has lived on the reservation all his/her life (4)

- Established rapport with patients of diverse cultural and educational backgrounds (2, 3)
- Assisting in staffing and providing follow-up care of clients in prenatal clinic, chest clinic and diabetic clinic (2)
- Perform physical assessments (2)
- Conduct diagnostic health screening programs and clinics (2)
- Function independently within all areas of clinical nursing (2, 3)
- Coordinate health care needs of all patients through analyzing the needs, evaluation and referral to appropriate resources (2, 3)
- Worked as a community health representative prior to attending nursing school (4)
- Ability to plan and apply nursing process in patient care using the SOAP method of charting (2)
- Discharge planning of geriatric and mentally retarded patients for proper placement (2)
- Providing gynecological health maintenance with an emphasis on family planning (2)
- Doing initial visits and assessments and periodic ongoing visits to monitor needs, problems and level of care (2)
- Develop and teach an orientation program on native healing practices (3, 4)
- Worked with Spanish speaking clients (4)
- Teaching patients within hospital setting and for discharge planning (2, 3)
- Assisted newly discharged mothers with newborn care (2)
- Teaching and counseling on a one-to-one basis with patients and their families (3)
- Wrote newspaper articles appearing in tribal newspaper and other local papers about many health related subjects. (3, 4)

- Follow-up and investigation of communicable diseases (2)
- Speak tribal dialect (4)
- Provide individual and family counseling regarding health maintenance and prevention of disease (2, 3, 4)
- Coordinated tuberculosis screening and treatment program including monthly patient interviews (2)

For the GS-9 level:

(1) A - to apply community health nursing principles/ theories/practices in providing nursing services to individuals, families, and communities;

(2) A - to plan and manage assigned duties;

(3) A - to provide counseling and teaching to individuals and families, with a variety of health problems; and

(4) P - acceptance and sensitivity of varied life styles, healing methods, and practices.

As examples, these knowledges, skills, abilities, and personal characteristics may have been gained as follows (the number in parenthesis indicates which KSAP(s) it relates to):

- Conducted screenings and obtained referrals on children suspected of having developmental delay (1)
- Perform Denver Developmental Screening Tests (1)
- Provided home visits (1, 2, 3)
- Taught and counseled individuals and families in home health care (1, 3)

- Responsible for patient and family teaching for patients with diabetes, chronic obstruction, pulmonary disease, heart disease and hypertension (1, 3)
- Provide family planning education to groups (3)
- Provide health care and preventive services to individuals (1, 3)
- A tribal member who has lived on the reservation all his/her life (4)
- Provide discharge planning to insure continuity of care (1, 2)
- Provide comprehensive health care to family members in a community (1, 2)
- Develop and teach orientation program on Native American healing practices (3, 4)
- Provide direct patient care through home visits (1)
- Develop and implement nursing care plan to include family members (1, 2)
- Refer patients to appropriate community resources (1)
- Employed as a school nurse in a Tribal Head Start Program (4)
- Conduct school screening programs annually including physical assessments to provide adequate services to patients and families (1, 2)
- Deliver health education classes to high school students and community (2, 3)
- Taught classes in native language to community groups (3, 4)
- Responsible for all follow-up of communicable disease which included epidemiology and patient teaching (1, 2, 3)
- Worked as a nurse for a Tribal Health Program (4)

For the GS-11 level:

(1) A - to apply community health nursing principles/ theories/practice to independently provide comprehensive nursing services to individuals, families, and communities;

(2) A - to assess needs, and plan, implement and evaluate community health programs;

(3) A - to develop, implement, and evaluate preventive health education services; and

(4) P - acceptance and sensitivity of varied life styles, healing methods, and practices.

As examples, these knowledges, skills, abilities, and personal characteristic may have been gained as follows (the number in parenthesis indicates which KSAP(s) it relates to):

- Develop patient-teaching handouts for home health care (3)
- Responsible for communicable disease control and the coordination with local, state and Federal agencies (1)
- Helped establish the Tribal Health Department and Tribal Health Board (2, 4)
- Provided training to community health representative staff (3, 4)
- A Tribal member who has lived on the reservation all his/her life (4)
- Taught and monitored students in community health nursing (l, 3)
- Coordinated community education programs (2, 3)

- Supervised and taught 10 senior-level nursing students of baccalaureate program in the theory and practice of community health nursing (1)
- Coordinated high risk infant tracking program - including services, home visits and clinical follow-up (l, 2)
- Developed a training program for community health representatives (2, 3, 4)
- Made visits with other nurses to teach them new procedures and to supervise care in the home (1)
- Plan and evaluate programs such as maternal/child health, prenatal, immunization, etc. (2)
- Work as a counselor in a Tribal Alcoholism Program (4)
- Plan and provide comprehensive community health nursing services to beneficiaries in their homes (1)
- Provide community health nursing services in special settings, i.e., reservation schools, and preventive health clinics (l, 2, 4)
- Promote and participate with other health disciplines and with tribal and community representatives in the planning; and development of community health resources (2, 4)
- Participate with other health education and welfare disciplines in an integrated approach toward providing total health care to individuals, families and communities (1, 2, 3, 4)
- Taught classes in native language to community groups (4)
- Maintain records and reports and evaluate the effectiveness of community health nursing services (2)
- Plan and coordinate all nursing activities for community health representatives and tribal community health nurses (2, 4)
- Serve as advisor to Tribal Child Protection Team (4)

- Develop and teach orientation program on Native American healing practices (4)
- Taught health classes to school staff (3)
- Served as Community Health Representative Program Director (4)

For positions at GS-5: graduates of an associate degree or diploma nursing program of less than 30 months' duration may have experience as a practical nurse or nursing assistant (either voluntary or paid) credited for grade GS-5 on a month-for-month basis to a maximum of 12 months. The practical nurse or nursing experience must have been:

(a) gained under the supervision of a professional nurse;

(b) equivalent to GS-4 or higher; and

(c) relevant to community health nursing.

For grades GS-7 through 11 at least 6 months of the professional nursing experience must have been at the level of difficulty comparable to that of the near lower grade in the Federal service, or 1 year comparable to the second lower grade.

The applicant's total experience must give evidence of ability to perform the duties of the position. For positions at GS-9 and above, 1 year of professional nursing experience must be sufficiently related to community health nursing in both subject-matter and grade-level, to demonstrate the candidate's ability to perform the major duties of the position being filled.

Candidates for positions at GS-12 and above must have at least 1 year of experience at the next lower grade, and must demonstrate a record of accomplishment, professional competence, leadership, and recognition in the profession as

in the planning, organizing, directing, and coordinating of nursing projects, or in well-established service as an expert and consultant.

2. Education

In addition to the basic requirements, the following amounts and levels of education are qualifying for grades GS-7 and above, as shown:

Grade:	Minimum amount or level of education in subjects such as child growth and development, health education, sociology, social work, epidemiology, statistics, microbiology, or geriatrics
GS-7	One full academic year of graduate education.
GS-9	Completion of all requirements for a master's or equivalent degree or Two full academic years of graduate education.
GS-11	Completion of all requirements for a doctoral degree (Ph.D. or equivalent) or Three full academic years of graduate education.

Alternate Requirements

Superior academic achievement at the baccalaureate level is qualifying at grade GS-7. A combination of superior academic achievement at the baccalaureate level and 1 year of community health nursing experience is qualifying at grade GS-9. In each case, the pertinent criteria may be found in the section on Crediting Education in the Introduction to the Indian Health Service Excepted Service Qualification Standards for Positions Under the General Schedule.

3. Combinations of Professional Experience and Graduate Education

Equivalent combinations of professional experience and graduate education of the types described above are acceptable at each grade. Community health nursing requires particular specialized education and experience specified in 1 and 2 above.

Possible Selective Factors

In some positions, knowledges, skills, and abilities beyond those required by application of the basic qualification standard are necessary. This is occasionally true at the entry level but more often would apply only at higher grade level (e.g., GS-9 and above). In such cases, the use of selective factors as screen-out elements in determining who is basically qualified for the position may be appropriate.

In this occupation in the Indian Health Service, the following are examples of selective factors that may be appropriate if they are essential for satisfactory performance in the particular position being filled:

- knowledge of and skills in current community health nursing practices.
- ability to drive a motor vehicle in a variety of weather and road conditions.

In some instances, these additional knowledges, skills, and abilities are not essential for satisfactory performance in the position being filled but they are desirable for superior performance in the position. In such cases, these additional knowledges, skills, and abilities cannot be used as selective factors in determining who is basically qualified for the position, but they can be used as quality ranking factors in

distinguishing between best qualified applicants and minimally qualified applicants.

Both selective factors and quality ranking factors must be directly related to the duties and responsibilities of the position being filled, and if they are used, they must be stated on the vacancy announcement.

Supervisory Positions

For supervisory positions, see the qualification standard for Supervisory Positions in the section on Supervisory Positions In the Introduction to the Indian Health Service Excepted Service Qualification Standards for Positions Under the General Schedule.

Interview

Applicants who meet the education, experience, and other requirements may be required to appear for an employment interview. The purpose of the interview is to observe and evaluate personal characteristics and qualities which are essential to the successful performance of the duties of the position.

Qualification Inquiries

Reference inquiries, including contacts with candidate's teachers, supervisors, or other persons familiar with the candidate's qualifications may be made to obtain further information about the candidate's professional and personal qualifications for these positions.

Basis for Rating

No written test is required. Applicants will be rated on the extent and quality of their education and experience. Such ratings will be based upon the applicant's statements in the application and upon any additional information that may be secured, including that secured by inquiries made to supervisors, schools and other references.

Applicants identified as basically qualified will have their applications ranked according to provisions set forth in the Indian Health Service Excepted, Service Examining Plan issued by memorandum dated March 26, 1984 or subsequent plan.

Inservice Placement Actions

Specialized nursing requirements for positions GS-9 and above may be waived for lateral reassignment or promotion of employees, provided:

1. The candidate has had experience which provided knowledge of the work of the position for which being considered; and
2. A review of the candidate's experience and performance indicate possession of the necessary skills and abilities and evidence of definite potential for successful performance of the work.

Physical Requirements

Applicants must be physically and mentally able to efficiently perform the essential functions of the position without hazard to themselves or others. Depending on the essential duties of a specific position, usable vision, color vision, hearing, or speech may be required. However, in most cases, a specific

physical condition or impairment will not automatically disqualify an applicant for appointment. The loss or impairment of a specific function may be compensated for by the satisfactory use of a prosthesis or mechanical aid. Reasonable accommodation may also be considered in determining an applicant's ability to perform the duties of a position. Reasonable accommodation may include, but is not limited to: the use of assistive devices, job modification or restructuring, provision of readers and interpreters, or adjusted work schedules.

Also, all positions involving Federal motor vehicle operation carry the additional medical requirements specified in Federal Personnel Manual Chapter 930, appendix A, Physical Standards for Motor Vehicle Operators and Incidental Operators.

SUPPLEMENTAL APPLICATION
EXCEPTED SERVICE, INDIAN HEALTH SERVICE
COMMUNITY HEALTH NURSE, GS-610-5/7/9/11

Name:_____

Grade Level(s) applying for:_____

State(s) Licensed in:_____

Registration No(s). and Date(s) of Expiration for each License:_____

_____

Number of months of experience directly related to community health nursing:

_____

Number of semester/quarter hours (indicate which) directly related to community health nursing:_____

PLEASE ATTACH A COPY OF YOUR OFFICIAL COLLEGE TRANSCRIPTS

Number of hours and course title(s) of continuing education directly related to community health nursing:_____

_____

_____

If it has been more than 5 years since your last professional nursing experience, have you taken refresher courses during that period (i.e., college courses or continuing education), had a preceptorship or performed volunteer work that utilized your skills as a community health nurse?

Yes ☐ No ☐ If yes, please explain:_____

_____

Check the geographic locations where you would be interested in working (we do not have community health nursing positions in Alaska):

☐ Aberdeen Area
☐ Albuquerque Area
☐ Bemidji Area
☐ Billings Area
☐ Navajo Area
☐ Oklahoma Area
☐ Phoenix Area
☐ Portland Area
☐ Nashville Area
☐ Tuscon Area

BEST AVAILABLE COPY

Describe the areas in your background that show how you possess each of the knowledge, skills, abilities and personal characteristics (KSAPs) listed below for the positions(s) (grade levels) you wish to be considered for. If you wish to be considered for more than one grade level, you will need to address the KSAPs for each grade level.

In addressing the KSAPs be sure to include formal education, training, job related experience, experience and background unique to [illegible] people, awards, outside activities, volunteer work, personal characteristics, etc. The KSAPs may be addressed on a separate sheet of paper.

GS-5:

1. Knowledge of general nursing principles;

2. Ability to apply current nursing procedures and techniques of patient care;

3. Knowledge of client teaching; and

4. Personal characteristic of acceptance of and sensitivity to varied life styles, healing methods, and practices.

GS-7:

1. Knowledge of community health nursing principles, theories and practices;

2. Skill in application of current nursing procedures and techniques of patient care;

3. Knowledge of client teaching/counseling techniques; and

4. Personal characteristic of acceptance of and sensitivity to varied life styles, healing methods, and practices.

GS-9:

1. Ability to apply community health nursing principles, theories, practices in providing nursing services to individuals, families, and communities.

2. Ability to plan and manage assigned duties;

3. Ability to provide counseling and teaching to individuals and families, with a variety of health problems; and

4. Personal characteristic of acceptance of and sensitivity to varied life styles, healing methods, and practices.

GS-11:

1. Ability to apply community health nursing principles, theories, and practices to independently provide comprehensive nursing services to individuals, families, and communities.

2. Ability to assess needs, and plan, implement and evaluate community health programs;

3. Ability to develop, implement, and evaluate preventive heath education services; and

4. Personal characteristic of acceptance of and sensitivity to varied life styles, healing methods, and practices.

ATTENTION - THIS STATEMENT MUST BE SIGNED.

I certify that alt of the statements made in this statement are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signature _____ Date Signed_____

INDIAN HEALTH SERVICE

EXCEPTED SERVICE

QUALIFICATION STANDARDS

FOR

POSITIONS UNDER THE GENERAL SCHEDULE

TRANSMITTAL SHEET N0. 5

December 1988

This transmits an exception to the cumulative years of experience requirements in the standard.

Persons may qualify who have one year of closely related specialized experience equivalent to the next lower level (in the normal line of progression for the occupation) even though they do not meet the cumulative years of experience requirements outlined in the standard.

Such candidates need not meet any other general or specialized experience requirements listed in the standard if their total backgrounds demonstrate the knowledge, skills, and abilities necessary for successful job performance. However, candidates must meet any minimum education, licensure, or other special qualification requirements, and selective factors established for the position being filled.

Reproduce and file this transmittal with each of the following standards:

Introduction to the Indian Health Service Excepted Service Qualification Standards for Positions Under the General Schedule

Social Work Series, GS-185

Community Health Nurse Series, GS-610

Nurse Series, GS-610

Pharmacist Series, GS-660

Dental Assistant Series, GS-681

Contracting Series, GS-1102

/s/
Everett R. Rhoades, M.D.
Assistant Surgeon General
Director, Indian Health Service

INDIAN HEALTH SERVICE

EXCEPTED SERVICE

QUALIFICATION STANDARDS

FOR

POSITIONS UNDER THE GENERAL SCHEDULE

TRANSMITTAL SHEET NO. 6

December 1988

This transmits a chart showing the major differences between IHS Excepted Service Standards and Competitive Service Standards for the following standards:

Social Work Series, GS-185

Community Health Nurse Series, GS-610,

Nurse Series, GS-610

Pharmacist Series, GS-660

Dental Assistant Series, GS-681

Contracting Series, GS-1102

Reproduce and file this transmittal with each of the standards.

/s/
Everett R. Rhoades, M.D.
Assistant Surgeon General
Director, Indian Health Service

MAJOR DIFFERENCES BETWEEN IHS EXCEPTED SERVICE STANDARDS AND COMPETITIVE SERVICE STANDARDS

Standard	Difference in Basic Qualifications	Other Differences
Social Work, GS-185	None.	None.
Community Health Nurse, GS-610	KSAPs developed as part of basic quals. Must be used as selective factors in the competitive service.	Covered by a separate standard rather than part of overall nurse standard.
Nurse, GS-610 (Excluding Community Health Nurse)	Nurses with associate degrees and graduates of diploma programs of less than 30 months can be promoted to GS-5 after six months instead of the one year experience required in the competitive service.	Knowledge of and skill in current nursing practice listed as a possible selective factor as well as possible quality ranking factor.
Pharmacist, GS-660	Applicants who graduated from approved school of pharmacy within the last 72 months may be appointed at grade for which qualified pending attaining State registration/licensure within 9 months after appointment. No such provision in the competitive service.	Stipend internship program to be set up at GS-7 level separate from the standard.
Dental Assistant, GS-681	None.	None.

(TS 6)
November 1988

Standard	Difference in Basic Qualifications	Other
Contracting, GS-1102	Added a GS-4 entry level for applicants with associate degree in a related field, or 30 months general experience, or 24 months general experience which included 6 months gained working for or with Native Americans, or a time equivalent of education and experience.	None.
	To qualify for GS-5, need bachelor's degree in any field, or 36 months of general experience, or 30 months of general experience which included 6 months gained working for or with Native Americans; or, in addition to GS-4 requirements, 6 months of specialized experience, or time equivalent of experience and education. The X-118 requires a bachelor's degree with major study in specific areas or 24 semester hours in certain disciplines; or 36 months general experience. In both standards, 1 year of the general experience must be equivalent to GS-4 grade level. In general, the competitive service standard is more restrictive in the kinds of qualifying education and experience at GS-5.	None.

NOTE: For all standards, if a factor is used as a selective factor or quality ranking factor in the excepted service, it must also be used in the same way in the competitive service.

The cumulative years of experience requirements in these standards have been amended (TS No. 5) to allow 1 year of closely related specialized experience equivalent to the next lower level to be qualifying.

(TS 6)
December 1988

(Cite as: 57 FR 57070)1992 WL 352728 (F.R.)

NOTICES

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Plan for the Completion of the Review of Qualification Standards for Indians in the Excepted Service

Wednesday, December 2, 1992

*57070
(Cite as: 57 FR 57070, *57070)AGENCY: Indian Health Service, HHS.

ACTION: Notice of the plan for the completion of the review of qualification standards for Indians in the Excepted Service.

SUMMARY: In accordance with a court order in Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984), the Indian Health Service (IHS) is publishing a final notice of its intention to adopt the United States Office of Personnel Management (USOPM) qualification standards (X-118 standards) for all personnel series not yet covered by excepted service standards published for Indian applicants in the IHS with provision for the use of selective factors and quality ranking factors.

EFFECTIVE DATE: December 2, 1992.

FOR FURTHER INFORMATION CONTACT:Mrs. Merry Elrod, Division of Self-Determination Services, Office of Tribal Activities, room 6A-05, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-1044 (This is not a toll-free number.).

SUPPLEMENTARY INFORMATION: Notice is hereby given that the IHS intends to adopt the USOPM qualification standards (X-118 standards) for all personnel series not yet covered by excepted service standards published for Indian applicants in the IHS with provision for the use of the following selective factors or quality ranking factors:

a. Ability to speak and interpret the language of the Native American population to be served.

b. Knowledge of the culture, customs, and beliefs of the Native American population to be served. A review of the qualifications standards for Indian employees or applicants for employment in the IHS was required as a result of the decision by the United States Court of Appeals for the Ninth Circuit in Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984). This review has resulted in very few substantive changes in existing USOPM standards. The recommendation that has been incorporated in all the standards is to allow the use of selective factors and quality ranking factors, when appropriate, that pertain to knowledge, skills and abilities relating to Indian language and/or culture. As shown above in a. and b., the only changes that would be made in the remaining series would be this wording. A listing of the completed studies and established excepted service standards for the 316 general schedule occupational series and all the trades and labor series is attached.

Plan for the Completion of the Review of Qualification Standards for Indians in the Excepted Service

Background

On June 7, 1984, the United States Court of Appeals for the Ninth Circuit issued a decision in favor of the plaintiff who had contended that the Secretary of Health and Human Services (HHS) was required by the Indian Preference Act, 25 U.S.C. 472, to adopt separate qualifications for Indian

employees and applicants for employment in the IHS. The Court of Appeals agreed with the District Court that the Indian Preference Act "requires the Secretary to adopt standards for evaluating the qualifications of Indians for employment in the Indian Health *57071
(Cite as: 57 FR 57070, *57071)Service that are separate and independent from the generally applicable civil service standards," and "give sufficient weight to the unique experience and background of Indians, including their superior knowledge of Indian needs and problems." The decision required the Department of HHS to establish qualification standards for Indians who apply for jobs in the Excepted Service when they apply for jobs under 5 CFR 213.3116(b)(8) for Indians entitled to Indian preference. Excepted appointments are not subject to the Competitive Service appointment requirements established by the USOPM.

In addition to the above requirements, the Court stated: "If, after giving full weight to the unique experience and background of Indians, as required by statute, the Secretary concludes that the only proper qualifications for a particular position are those that have already been adopted as part of the civil service regulations (his) separate and independent adoption of the same standards would not be unlawful." The Secretary has determined that because the USOPM standards were recommended, no further review is required.

The standards review that has been made over the last several years has resulted in no substantive changes. One recommendation that has been incorporated in all the standards developed is to allow the use of selective factors and quality ranking factors, when appropriate, that pertain to knowledge, skills and abilities relating to Indian language and/or culture.

Studies have been completed and Excepted Service standards have been established for 316 general schedule occupational series and all trades and labor occupations. These standards

cover approximately 166 occupational series in the IHS and 12,960 IHS employees. This constitutes 92 percent of the IHS work force. There are approximately 26 series that have not been studied. This includes three student trainee series and 16 series with populations under 50 employees.

Purpose

To adopt, for the remaining USOPM job series, the X-118 qualification standards with selective factors and quality ranking factors, when appropriate, that relate to knowledge, skills and abilities relating to Indian language and/or culture. The qualification standards will apply to Indians appointed to positions under 5 CFR 213.3116(b)(8).

Objectives

To satisfy the requirements by the United States Court of Appeals for the Ninth Circuit in Preston v. Heckler, 734 F 2d, 1359 (9th Cir. 1984). To complete the review of the Qualification Standards for Indians in the IHS, the X-118 qualifications standards are to be adopted as Excepted Service standards with provision for the use of the following selective factors or quality ranking factors:
a. Ability to speak and interpret the language of the Native American population to be served.
b. Knowledge of the culture, customs, and beliefs of the Native American population to be served.
Dated: November 5, 1992.

Everett R. Rhoades,

Assistant Surgeon General, Director.

Completed Studies

Studies completed cover approximately 166 occupational series in IHS and 12,960 IHS employees which constitutes 92 percent of the IHS work force. In all, 316 General Schedule occupational series and all the trades and labor occupations have been reviewed and excepted service standards have been established. There are approximately 26 series not covered. The information below lists the studies completed and the series not covered.

Completed Studies

Social Work (March 1987), 123 employees.
Community Health Nurse (March 1987), (See "Nurse").
Dental Aid/Assistant (March 1987), 419 employees.
Pharmacist (February 1988), 351 employees.
Contract Specialist (March 1988), 111 employees.
Nurse (August 1988), 2,283 employees (including Community Health Nurse).
65 One-Grade Interval Clerical and Administrative Support Series (January 1989), 2,744 employees.
41 One-Grade Interval Technical, Medical, and Program Support Series (November 1989), 1,291 employees (excluding 419 employees in Dental Aid/Assistant Series superseded by this standard). 98 Two-Grade Interval Administrative, Management, and Specialist Series (June 1990), 900 employees.
Trades and Labor Occupations (June 1990), 1,565 employees.
Dental Officer (August 1991), 329 employees.
86 Two-Grade Interval Professional Series (May 1992), 641 employees.
Medical Officer (July 1992), 1034 employees.
Practical Nurse (July 1992), 490 employees.
In addition, a revised Instructions for Users was developed and printed (August 1990).

Series Not Covered

Guards, 61 employees.
General Student Trainee, 38 employees.
Social Science Aid/Technician, 16 employees.
Social Services, 27 employees.
Social Science Student Trainee, 1 employee.
Support Services Administration, 41 employees.
Equal Opportunity Assistant, 4 employees.
Physicians Assistant, 114 employees.
Medical Supply Aid/Technician, 71 employees.
Physical Therapist, 43 employees.
Medical Technologist, 312 employees.
Optometrist, 59 employees.
Speech Pathologist/Audiology Technician, 14 employees.
Podiatrist, 5 employees.
Dental Hygiene, 20 employees.
Sanitarian, 163 employees.
Health Aid/Technician, 70 employees.
General Attorney, 2 employees.
Contact Representative, 8 employees.
Librarian, 3 employees.
Technical Information Services, 1 employee.
Education/Training Technician, 9 employees.
Education/Vocational Training, 3 employees.
Training Instruction, 7 employees.
Public Health Education, 1 employee.
Education Student Trainee, 1 employee.

(FR Doc. 92-29219 Filed 12-1-92; 8:45 am)

BILLING CODE 4160-16-M

57 FR 57070-01, 1992 WL 352728 (F.R.)
END OF DOCUMENT
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AFFIDAVIT (Typed Confirmed Copy)

State of N. Dakota
County of Rolette

I, Marilyn Brown Dionne, Public Health Nurse, GS-9 at the Indian Health Service, Belcourt, N. Dakota, hereby solemnly swear to the following statement.

I am an American Indian, female, born January 22, 1954 in Belcourt, N. Dakota. I am, by nationality a member of the Turtle Mountain Band of Chippewa. I have been employed at the Indian Health Service, Belcourt, N. Dakota since May 17, 1991. My U.S. Government employment dates back to August 25,1988 when I was employed by the Public School System on the Chippiwa Reservation. I was employed as a paraprofessional. From May 17, 1991 I worked as a Clinical Nurse for the Indian Health Service, a position which I held until June 1, 1993. At that time I became Public Health Nurse at my request, because Public Health Nursing has always been my interest. As a Clinical Nurse I was a GS-9. In order to make the change, I was told by Mr. Clarence Frederick, Service Unit Director, that I would have to take a demotion to GS-7 "Because that's the way it is." There was no other explanation. I accepted this demotion in order to make the transition. I know of three other American Indian Female Nurses who had to accept demotion in order to make the transition from Clinical Nursing to Public Health Nursing.

They are 1) Linda La Fromboise; 2) Marianne Belgarde; 3) Doris Gunville

I started my Public Health Nursing on June 1, 1993. On May 15, 1994, Susan Kartes was hired as a Public Health Nurse in our department. She had been interviewed and hired on the recommendation of Georgia Ortiz, Director of Public Health Nursing, who is also supervisor. I do not know if Ms.

Ortiz made any recommendation's concerning the grade level at which Ms. Kartes would be hired.

At this point I would like to incorporate into my sworn affidavit a letter from me to Mr. Lynn David, EEO Counselor, dated August 2, 1994. This letter gives the details and specifics of my Complaint. This a three page letter. As a further indication of my experience level, I would like to add, when I became a Public Health Nurse, I was not assigned a preceptor. I was told that because of my experience and background I did not need anyone to oversee my work. This was based on my origin from within the local American Indian Community and my many years experience in working with my people in various jobs relating to Nursing. I believe these to be very important in considering grade level. When Susan Kartes started to work in our department, I was assigned as her preceptor.

Insert my three page letter of August 2, 1994.

Lynn Davis, Administrative Officer
EEO Counselor
PHS Hospital
Belcourt, North Dakota 58316
August 2, 1994

Dear Mr. Davis,

My name is Marilyn Dionne. I'm a Native American female and an enrolled member of the Turtle Mountain Band of Chippewa. I have lived 30 years of my 40 years here. I've went to school and worked on the reservation in various positions in the nursing field.

I've worked at the Belcourt PHS Hospital for three years, at the present time as a Public Health Nurse. Two years I worked as a clinical nurse in various areas from: emergency room, labor and delivery, medical and surgical, clinic and speciality clinics (prenatal, cardiac, etc.), operating room and recovery. Many of these areas were very familiar because I had the experience as an LPN, since 1976, (the days when LPNs were able to do much more and were considered part of the team). I also had experience in home health as an LPN from 1987 to 1991. I've been told so many times that we are not "home health". I was a preceptor for student nurses, I was assigned to areas where I worked charge: ER, clinic and labor and delivery, etc..

Public health nursing was my interest after graduating in 5-1991 because of my experience in home health and I did well in my community health rotation, clinical and grade. During my clinical rotation in community health I spoke to the Director of Public Health Nursing, Leslie Carlson, about my interest in this area and she encouraged me to apply for the position coming open. I applied for the community health position (copy enclosed) and a clinical nurse position. I was

told that I needed one year of experience as an RN before I could get into Public Health Nursing. A couple of months ago a RN with less than one year of experience was hired with the exception of her GPA, well if this is the case I should have been hired three years ago. I applied, that position was filled two months later by a non-Indian nurse.

On June 1, 1993, I entered the position I now hold as a public Heath Nurse as a GS 7-9 from a G5 9-2. The job was not advertised as an entry level. I was not demoted in pay but in grade level and in spirit. I worked my way up the career ladder to be degraded! I had alot more responsibilities and dealt with life and death situations far more often as a clinical nurse. I thought this was history for Native Americans but yet we're seeing it in this day and age, within our systems. May 15, 1994 a non-indian nurse started in our department, with no Public Health Nursing, and came in as a GS 11-1, with home health experience. At the time she was hired two Native American nurses started and started at GS 7 levels. One came from within the system and one had been in the system prior to this and both nurses were GS 9's. These positions were not advertised as entry level positions, no training for a year was available.

At the present time I'm awaiting my step increase from GS 7-9 to GS 9-3 that should have been effective May 16, 1994. The paper work was done May 15, 1994 but never got to Aberdeen. I'm tired of beening told "your a 7." The paper work was redone the week of July 11, 1994, I have not heard anything! I should have started June 1, 1993 as a GS 9-2 and now going into a GS 11, grade step. Reasons as follows: 1. I functioned a GS 9 because of my experience. 2. I had no orientation. 3. I made home visits without assistance. 4. I provided patient education to prenatal clients, inwhich: I, enjoy. 5. I assisted with setting up our evening Childbirth Classes, with another student nurse. 6. Preceptor for student

nurses then and now. 7. I assess, monitor and evaluate clients/ family and their needs and home. 8. I use the nursing process and nursing diagnosis accordingly in my daily work with my clients and community. 9. I work with tribal officials and tribal counsel members. 10. I work with the PHS staff in all areas regarding my clients and other matters. 11. I set up meds. 12. I've done home health cares for clients: daily dressings, meds and venipuncture, ect.. 13. I'm, a certified CPR and first aid instructor since 1991. 14. I teach First Aid a our local college. 15. I have experience teaching since 1983 at the high school level as a Certified Health Occupations instructor. 16. I'm assigned to clinics: immunization with one time orientation and learned much on my own regarding shots. 17. I've orientated new staff. 18. 2 years experience as clinical nurse 19. LPN with 15 years experience 20. PC computer experience 21. Native American.

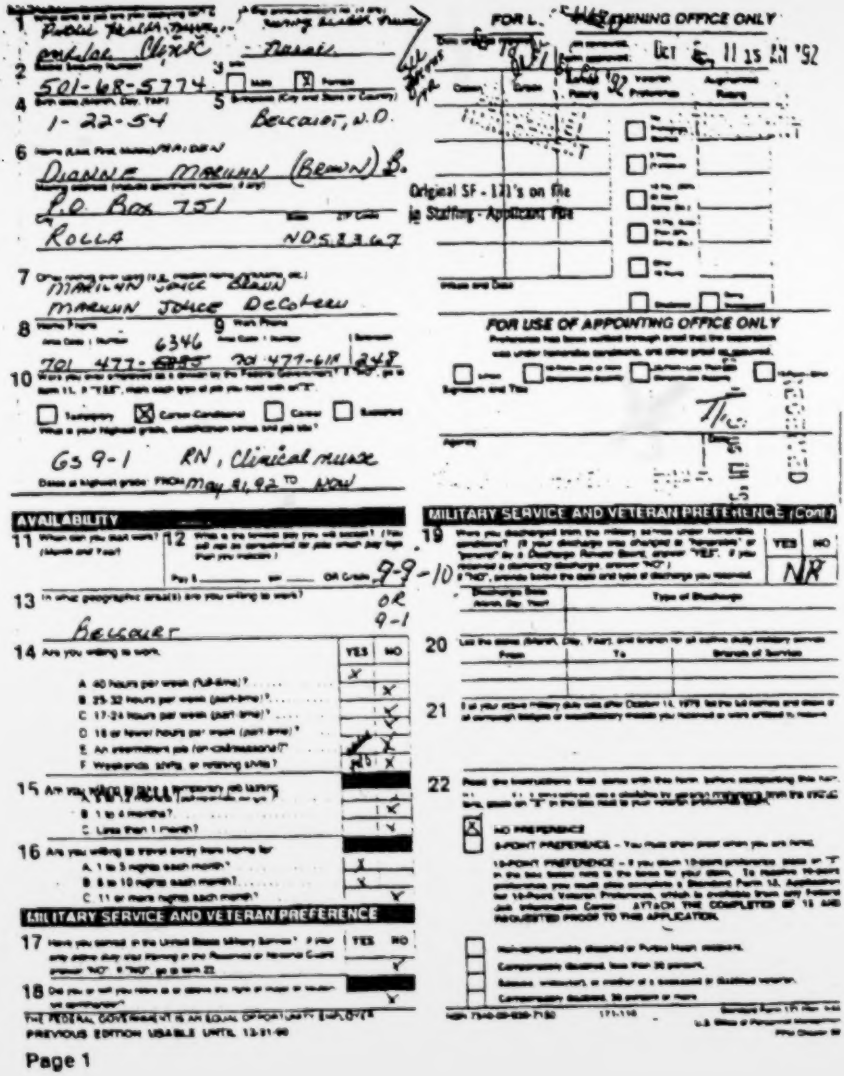
I have spoken openly about the unfairness of the above named complaints and double standards at work and within the IHS. I worked my way up the career ladder and earned my grade increases because of good EPMSs I gotten cash awards!

I believe I've been discriminated against in many ways. 1. Demoted and degraded 2. treated unfairly because of demotion 3. racism 4. makes it difficult to transfer from one department to other within our hospital, thus: it discourages our local Native American nurses from applying to Public health nursing. I fail to see any justification for not hiring me the first time in 1991, the demotion in 1993 and delay in grade step increase 1994. Please regard this as a formal complaint. I am requesting a full investigation into these matters with a justification of reinstating me as GS 11 because of undo process of demotion and all of my qualifications as stated above in my present position as a Public Health nurse. Thank you for your time and immediate attention.

Sincerely,

/s/

Marilyn B. Dionne
P.O. Box 751
Rolla, North Dakota 58367



1 Public Health Nurse — Nursing Service Nurse
2 Medical Clerk — Nurse
3 Sex: ☐ Male ☒ Female
4 Birth date (Month, Day, Year): 1-22-54
5 Birthplace (City and State or County): Belcourt, N.D.
6 Name (Last, First, Middle): MARLYN (BROWN) B. DIANNE MARLYN
Mailing address (Include apartment number if any): P.O Box 751
City: ROLLA State: ND ZIP Code: 58367
7 Other names ever used (For example, maiden name, nickname, etc.): MARLYN JOYCE BROWN MARLYN JOYCE DeCoteau
8 Home Phone: Area Code / Number: 6346
9 Work Phone: Area Code / Number / Extension: 701 477-6345 701 477-6114 248
10 Were you ever employed as a civilian by the Federal Government? If "YES", go to item 11. If "NO", mark each type of job you held with an "X".
☐ Temporary ☒ Career-Conditional ☐ Career ☐ Excepted
What is your highest grade, classification series and job title?
GS 9-1 RN, Clinical nurse
Dates at highest grade: FROM May 91 92 TO NOW

FOR EXAMINING OFFICE ONLY
Date Application Received: Oct 5, 11 15 AM '92
Claim: 10 Veterans' Preference: Augmented Rating:
Original SF - 171's on file
ie Staffing - Applicant File

FOR USE OF APPOINTING OFFICE ONLY
Preference has been verified through proof that the requirements was under honorable conditions, and other proof as required.
Signature and Title
Agency

AVAILABILITY
11 When can you start work? (Month and Year)
12 What is the lowest pay you will accept? (You will not be considered for jobs which pay less than you indicate.) Pay $ ____ per ____ OR Grade 9-9-10
13 In what geographic area(s) are you willing to work? OR 9-1
Belcourt

14 Are you willing to work:

	YES	NO
A 40 hours per week (full-time)?	X	
B 25-32 hours per week (part-time)?		X
C 17-24 hours per week (part-time)?		X
D 16 or fewer hours per week (part-time)?		X
E An intermittent job (on-call/seasonal)?		X
F Weekend, shift, or rotating work?	NS	X

15 Are you willing to take a temporary job lasting:

A Less than 1 month?		X
B 1 to 4 months?		X
C Longer than 4 months?		X

16 Are you willing to travel away from home for:

A 1 to 5 nights each month?	X	
B 6 to 10 nights each month?	X	
C 11 or more nights each month?		X

MILITARY SERVICE AND VETERAN PREFERENCE

	YES	NO
17 Have you served in the United States Military Service? If your only active duty was training in the Reserves or National Guard, answer "NO". If "NO", go to item 22.		X
18 Do you or will you have a U.S. active duty type of major or leadership experience?		X

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MILITARY SERVICE AND VETERAN PREFERENCE (Cont'd)

	YES	NO
19 Were you discharged from the military service under honorable conditions? (If your discharge was changed to "honorable" or "general" by a Discharge Review Board, answer "YES". If you received a dishonorable discharge, answer "NO".) If "NO", provide below the date and type of discharge you received.		NR

Discharge Date (Month, Day, Year): Type of Discharge:

20 List the dates (Month, Day, Year), and branch for all active duty military service.

From	To	Branch of Service

21 If you were in military service after October 14, 1976, list the full name(s) and dates of all commander, designer or supervisory manager you received or were entitled to receive.

22 Read the instructions that came with this form before completing this item. If you served, and a condition for which you received a campaign badge, answer "X" in the box next to your veterans' preference.

☒ NO PREFERENCE
5-POINT PREFERENCE – You must show proof when you are hired.
10-POINT PREFERENCE – If you claim 10-point preference based on "X" in the box below next to the basis for your claim. To receive 10-point preference you must also complete a Standard Form 15, Application for 10-Point Veteran Preference, which is available from any Federal job information Center. ATTACH THE COMPLETED SF 15 AND REQUESTED PROOF TO THE APPLICATION.
☐ Non-compensable disabled or Purple Heart recipient.
☐ Compensable disabled less than 30 percent.
☐ Retired veteran(s), or member of a uniformed or disabled veteran.
☐ Compensable disabled, 30 percent or more.

Page 1

BEST AVAI

23 May we ask your present employer [illegible]

24 READ WORK EXPERIENCE IN THE INSTRUCTIONS BEFORE YOU BEGIN.

A

PMS
Bismarck, N.D. 58316

From May 18 90 To Now | Hours per week 40 | Number of employees you supervise 5-7

Starting salary $ 12.76 per HOUR
Ending salary $ 17.12 per hour

Your reason for wanting to leave: new challenge, ability to advance

Your supervisor's name | Area Code | Telephone No. | May we contact? YES NO

Brenda Heinle | 701 | 751-8100 | Clinical nurse, RN | GS 9-1 | 5-31-92

Describe your specific duties, responsibilities and accomplishments in this job, including the job duties of any employees you supervised. If you need more space, attach another sheet and type the number of the job you are describing.

I supervise RN's, LPN's and aides. I work as a charge nurse in the following areas: MHS, OB, Peds, ER, OR & ICU. I will assess the MHS, OB etc. Peds. I pass medication, start IV, and start intravenous lines. I am on emergency and in ICU and transport. I in also a preceptor for all new employees. I am also on the Nurse Practice Committee. I access, assess, plan, chart, prepare ICU according to the diagnosis and immediate needs regarding the family. I notify the patient's physician and the physician on call for the patients immediate changes in health status and/or needs. I assign duties as needed.

For Agency Use (Skill codes, etc.)

B

Tri-Care Home Health
Rolla, N.D. 58367

From 6-92 To 5-11-92 | Hours per week 40 | Number of employees you supervise 5

Starting salary $ per
Ending salary $ 9.52 per hour

Your reason for leaving: new position/job

Your supervisor's name | Area Code | Telephone No. | May we contact?
Lori Sellen | 701 | 477-6224 | yes

Describe your specific duties, responsibilities and accomplishments in this job, including the job duties of any employees you supervised. If you need more space, attach another sheet and type the number of the job you are describing.

I supervise LPN's & aides, orientate new employees. My duties were home visits to patients & clients and other groups. I assess the patients physical, mental & social (and spiritual needs) during home visits. I set up medications according to physician orders (charge) in multiplanner, set up doctor appointments and accompany the patients doctor up to date re: pt's/family's needs. I set up home health services & provide physical therapy according to physicians & personal therapists orders. I started many ongoing charge orders in the care & needs and changes within the home. I consult with updates (potentials) & inform plans with 2-3 months to keep the pt.-physician(s) up to date with the patients pains and problems also - the physician from/accepts [illegible]

For Agency Use (Skill codes, etc.)

Page 2 IF YOU NEED MORE EXPERIENCE BLOCKS, USE SF 171-A (SEE BACK OF INSTRUCTION PAGE)
[illegible] I [illegible] with [illegible] to clinic

ABLE COPY

25 [illegible] 25 [illegible] Bottle / Bl. Community College. Bilcoun N.D. SR 3/c

27 [illegible] YES X NO

28 NAME AND LOCATION (city, state and ZIP Code) OF COLLEGE OR UNIVERSITY | MONTH AND YEAR ATTENDED From To | NUMBER OF CREDIT HOURS COMPLETED | TYPE OF DEGREE | MONTH AND YEAR DEGREE RECEIVED

1) Lake Region Jr. College | Devils Lk ND 58301 | 75 76 | | LPN 2-76
2) Bottle Mt. Com College | Bilcoun ND 58203 | 87 89 | 109 | Assoc Science 5-91
3) Univers. of N. Dakota | Grand Forks ND 58201 | 89 91 | 64 | BSN 5-91

29 CHIEF UNDERGRADUATE SUBJECTS (Show major on the first line) | NUMBER OF CREDIT HOURS COMPLETED

1) Nursing (Lake Region) 64
2)
3)

30 CHIEF GRADUATE SUBJECTS (Show major on the first line) | NUMBER OF CREDIT HOURS COMPLETED

1)
2)
3)

31 [illegible]

NAME AND LOCATION (city, state and ZIP Code) OF SCHOOL | MONTH AND YEAR ATTENDED From To | CLASS ROOM HOURS | SUBJECT(S) | DIPLOMA? YES NO

1) American Heart Assoc Basic Life Support Instructor Course
Co [illegible] State ZIP Code
Bottle, N.D. ND 58318 | 8 | CPR instructor | Y

2) American Red Cross
Co Mid-Dakota Chapter State ZIP Code
Minot ND 58701 | 16 | Standard First Aid Instructor | Y

SPECIAL SKILLS, ACCOMPLISHMENTS AND AWARDS

32 [illegible] I graduated 5-91 from U of Mary and passed my nursing boards 7-91. I am a member of Sigma Theta Tau (nursing organ). Am a CPR/First Aid (Advanced) Instructor. I was chosen at TMCC - Who's Who - 5-92. Graduated with Honors Cum Laude. I also teach First Aid at TMCC. Am certified in ACLS 2-92 and working on being certified in PALS. Advisor for Nursing Club.

33 [illegible]

34 LICENSE OR CERTIFICATE | DATE OF LATEST LICENSE OR CERTIFICATE | STATE OR OTHER LICENSING AGENCY

1) RN | 5-91 to 5-93 | ND
2)

35 [illegible] YES X NO

LANGUAGE(S) | SPEAK FLUENTLY | SPEAK AND UNDERSTAND | CAN TRANSLATE ARTICLES | CAN READ ARTICLES FOR CONVERSATION

1)
2)

REFERENCES

36 [illegible]

FULL NAME OF REFERENCE | BUSINESS OR HOME ADDRESS (number, street, city) | STATE | ZIP CODE

1) Patricia Demers | [illegible] | In Care Somerset Apts Bilco ND | ND 58732
2) Arnold Meier | [illegible] | Bilco Clinic Bilco ND | ND 58203
3) Maxine Mitchell | [illegible] | Bilco ND | ND 58203

Page 3

DIONNE ... (BEAUREL) 501-08-52?

Public Health Nurse and/or ... NURSE 5/12 9-14-92

ADDITIONAL WORK EXPERIENCE BLOCKS

Turtle Mt. Community Schools
Belcourt, ND 58316
From 93 To 97 — 4 — Student
new job & other

Wayne Eagle Bear 701 477-6471 Health Occ. Instructor

I taught at the high schools levels 9th - 12th grades - who lived on or near the reservation. The students functioned after about 4 months of classroom lecture and practicums (Vitals, B.P. meiring etc.) as a nurses assistant. They were also encouraged to try other allied Pharmacy, Lab, dental, etc.
I also taught students and liaisons how to handle diabetics. ie. Took temperatures, used the thermometer, and the norms, I guided the class according to their abilities.

For Agency Use (Skill codes, etc.)

Rolla Hospital
Rolla, N.D. 58367
From 76 To 87 — 37-40 — 8
Starting $3.35 per hour — Ending $7.51 per hour — new job

Peg McDonell 701 477-3161 LPN

I functioned basically at a LPN level I would, obs. BP, T/P/R, Pain, I/O's & Tx - Turn (Turning Rx) I passed medications, gave IM injections under the supervision of LPN/MD. I completed assessments, cared & supervised 4 aides, 2 LPN's during many long hours and numerous patients. I precepted new aides, & nurses (LPN's/RN's). I'm also ACLS certified.

For Agency Use (Skill codes, etc.)

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Read the instructions before you c[illegible] this amendment. Type or print clearly in ink.

- You may use this form to update your [illegible] now who gave you Standard Form 171
- You must submit a new SF 171 if you have previously updated your application or have three or more ink
- Federal agencies must update your previously completed SF 171 as current when this form is signed electronically or unsigned

1 Reason for updating SF 171 (Check one)
- [X] To update my SF 171 for (Address position title or announcement number) 92-03-VAR CNN
- [ ] To update the SF 171 in my Official Personnel Folder
- [ ] To update the unsigned SF 171 [ ] As requested

2 Name (Last, First, Middle)
DIONNE MARILYN B

Mailing Address (Include apartment number, if any)
P.O. Box 751

City: Rolla | State: NDS.K.S.M.T | ZIP Code:

3 Birth date (Month, Day, Year): 1-22-54 | 4 Social Security Number: 501-68-5774

5 What is the highest pay or grade you are entitled? (You will be asked to verify this on your latest pay stubs from your employer.)
Pay $ 17.12 per have | OR Grade GS-7

6 Name on SF 171 (If being amended, if different than 2)
same

7 May we ask your present employer about your character, qualifications, and work record? A "NO" will not affect our review of your qualifications. If you answer "NO" and we need to contact your present employer before we ask other jobs to rate you we will contact you first. YES | NO X

WORK EXPERIENCE If you have no new work experience, write "NONE" in A below and go to 9 on the back.

8
- Describe your current or most recent job or volunteer experience in Block A and work backwards, describing up to 3 periods of experience not on your SF 171.
- If you were unemployed for longer than 3 months, list the dates and your activities in that time in 10.

A Name and address of employer's organization (include ZIP Code, if known)
PHS
BELCOURT, N. D. 58316

Dates employed (give month, day and year) | Average number of hours per week | Number of employees you supervise
From 5-12-91 To: Now | 40 | 0

Salary or earnings
Starting $ 12.76 per have
Ending $ 17.12 per have

Your reason for wanting to leave
CNN so my dad can be with her

Your immediate supervisor
Name: BERNIE MEIN | Area Code: 701 | Telephone No.: 477-6411

Exact title of your job
Clinical Nurse

If Federal employment (civilian or military) list series, grade or rank, and if promoted in this job, the date of your last promotion
GS 9 | 5-31-91

Describe your duties, responsibilities, and accomplishments in this job, including the job title(s) of any employees you supervise. If you describe more than one type of work (for example, carpentry and painting, or personnel and budget), write the approximate percentage of time you spent doing each.

See Form 171 and Resume 171 on file in Aberdeen for more information.
See B page.

For Agency Use (Mail codes, etc.)

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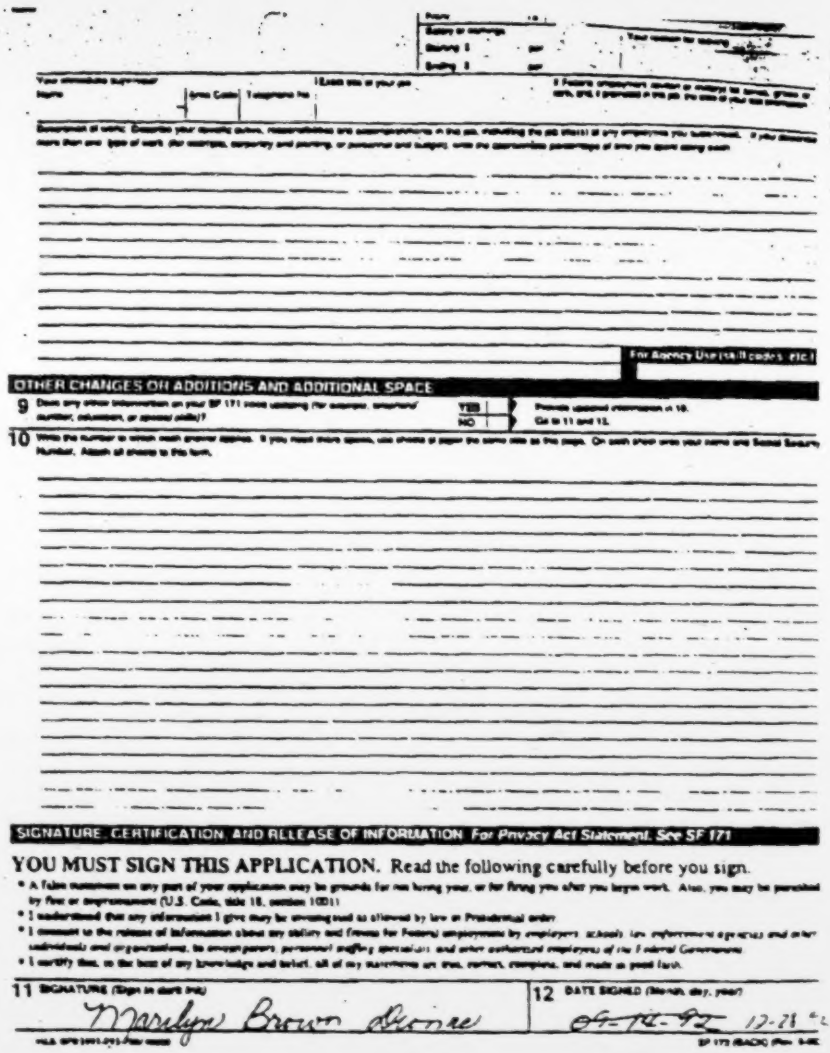
PREVIOUS EDITION USABLE | NSN 7540-00-142-8758 | 171-108

Optional Form 171 (Rev. 3-91) U.S. Office of Personnel Management Prescribed by OPM



OTHER CHANGES OR ADDITIONS AND ADDITIONAL SPACE

9 Does any other information on your SF 171 need updating (for example, maiden name, education, or special skills)?

YES — Provide updated information in 10.
NO — Go to 11 and 12.

10 Write the number in which each answer appears. If you need more space, use sheets of paper the same size as this page. On each sheet write your name and Social Security Number. Attach all sheets to this form.

SIGNATURE, CERTIFICATION, AND RELEASE OF INFORMATION *For Privacy Act Statement, See SF 171*

YOU MUST SIGN THIS APPLICATION. Read the following carefully before you sign.

- A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).
- I understand that any information I give may be investigated as allowed by law or Presidential order.
- I consent to the release of information about my ability and fitness for Federal employment by employers, schools, law enforcement agencies, and other individuals and organizations, to investigators, personnel staffing specialists, and other authorized employees of the Federal Government.
- I certify that, to the best of my knowledge and belief, all of my statements are true, correct, complete, and made in good faith.

11 SIGNATURE (Sign in dark ink) — Marilyn Brown Skinner

12 DATE SIGNED (Month, day, year) — ~~04-12-92~~ 12-28-92

37 Are you a citizen of the United States (Most states require that you be a U.S. citizen to work for them.) You may be asked to submit proof of citizenship at the time you begin work. If "NO," give the country or countries you are a citizen of. X

NOTE: It is important that you give complete and truthful answers to questions 38 through 44. If you answer "YES" to any of them, give your explanations in item 45. Include convictions resulting from a plea or bond forfeiture. Omit: 1) traffic fines of $100.00 or less, 2) any violation of law committed before your 16th birthday, 3) any violation of law committed before your 18th birthday, if finally decided in juvenile court or under a Youth Offender law, 4) any conviction set aside under the Federal Youth Correction Act or similar State law, 5) any conviction whose record was expunged under Federal or State law. We will consider the date, facts, and circumstances of each event you list. In most cases you can still be considered for Federal jobs. However, if you fail to tell the truth or fail to list all relevant events or circumstances, this may be grounds for not hiring you, for firing you after you begin work, or for criminal prosecution (18 USC 1001).

		YES	NO
38	During the last 10 years, were you fired from any job for any reason, did you quit after being told that you would be fired, or did you leave by mutual agreement because of specific problems?		X
39	Have you ever been convicted of, or forfeited collateral for any felony violation? (Generally a felony is defined as any violation of law punishable by imprisonment of longer than one year, except for misdemeanors called misdemeanors under State law which are punishable by imprisonment of two years or less.)		X
40	Have you ever been convicted of, or forfeited collateral for any firearms or explosives violation?		X
41	Are you now under charges for any violation of law?		X
42	During the last 10 years have you forfeited collateral, been convicted, been imprisoned, been on probation, or been on parole? Do not include violations reported in 38, 40, or 41, above.		X
43	Have you ever been convicted by a military court-martial? If no military service, answer "NO".		X
44	Are you delinquent on any Federal debt? (Include delinquencies arising from Federal taxes, loans, overpayment of benefits, and other debts to the U.S. Government plus defaults on Federally guaranteed or insured loans such as student and home mortgage loans.)		X

45 If "YES" in: 38 - Explain for each job the problem(s) and your reason(s) for leaving. Give the employer's name and address.
39 through 43 - Explain each violation. Give place of occurrence and name/address of police or court involved.
44 - Explain the type, length and amount of the delinquency or default, and steps you are taking to correct errors or repay the debt. Give any identification number associated with the debt and the address of the Federal agency involved.

NOTE: If you need more space, use a sheet of paper and include the item number.

Item No.	Date (Mo./Yr.)	Explanation	Mailing Address
			Name of Employer, Police, Court, or Federal Agency City State ZIP Code
			Name of Employer, Police, Court, or Federal Agency City State ZIP Code

		YES	NO
46	Do you receive, or have you ever applied for, retirement pay, pension, or other pay based on military, Federal civilian, or District of Columbia Government service?		X
47	Do any of your relatives work for the United States Government or the United States Armed Forces? Include: father, mother, husband, wife, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, and half sister.		X

If "YES," provide details below. If you need more space, use a sheet of paper.

Name	Relationship	Department, Agency or Branch of Armed Forces
Shirley Mason	Sister	U.S. Air Force Community School Social Worker Special Education

SIGNATURE, CERTIFICATION, AND RELEASE OF INFORMATION

YOU MUST SIGN THIS APPLICATION. Read the following carefully before you sign.

- A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).
- If you are a male born after December 31, 1959 you must be registered with the Selective Service System or have a valid exemption in order to be eligible for Federal employment. You will be required to certify as to your status at the time of appointment.
- I understand that any information I give may be investigated as allowed by law or Presidential order.
- I consent to the release of information about my ability and fitness for Federal employment by employers, schools, law enforcement agencies and other individuals and organizations, to investigators, personnel staffing specialists, and other authorized employees of the Federal Government.
- I certify that, to the best of my knowledge and belief, all of my statements are true, correct, complete, and made in good faith.

48 SIGNATURE (Sign each application in black ink) Marilyn Brown Stone

49 DATE SIGNED (Month, day, year) 09-14-92 (after offer 9-17-92)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

MARILYN DIONNE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. A4-96-130
	)	
DONNA E. SHALALA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAY GRANBOIS, DIRECTOR OF PUBLIC HEALTH SERVICE-BELCOURT, AND MICHAEL H. TRUJILLO, DIRECTOR OF INDIAN HEALTH SERVICES,	)	
	)	
Defendants.	)	

TRANSCRIPT OF TELEPHONE DEPOSITION OF

DELBERT HASKELL

Taken at
U.S. Attorney's Office
Bismarck, North Dakota

January 8, 1998

qualifications that will be needed of -- it says qualification requirements, and then there's a chart that says grade, and it has GS-7, 9, 11, and then above -- then GS-9 and GS-11, indicating the Baccalaureate degree program as to how long would be required and the --

A. Okay. Yes.

Q. It has that. Okay. And for someone who would be at the GS-11, what would be the length of the program that would be required for Baccalaureate degree?

A. If you're qualifying strictly education?

Q. Yes.

A. Master's degree program and one year.

Q. It says three years under Baccalaureate degree, and then Master's degree it says one year?

A. Right.

Q. Would that be correct?

A. For an 11?

Q. Yes.

A. Okay. Yeah. Two years graduate experience and one year work experience.

Q. And is the -- the one year work experience would be work in the public health area?

A. Yes. That's restricted to public health

* * *

the only consideration taken at arriving at her grade level." Do you recall that?

A. Yes, I do. Yes. I do recall writing that.

Q. Would that be a correct analysis?

A. Yes, to my understanding.

Q. And when you say her level of experience in community health nursing is the only consideration taken at arriving at her grade level, what do you include in community health nursing?

A. Duties performed as a registered nurse performing community health nursing responsibility. For example, visiting patients and observing their treatment in their home setting or another nursing home setting, or something to that effect, or in a school. Something other than a hospital.

Q. Were you aware that Ms. Dionne had worked in nursing home type of environments?

A. As a registered nurse?

Q. Yes. Or --

A. I guess was she a registered nurse?

Q. No. I think she was an LPN at that time.

A. She wasn't a registered nurse.

Q. She was an LPN. There may have been a slight period that she was registered, but it wouldn't have been very long, but you were aware she had that experience, anyway?

A. She had some LPN experience, correct.

Q. And you're saying that doesn't count?

A. Not as a registered nurse.

Q. Didn't you earlier say that in looking at the experience factor you look at any experience from the time of graduation?

A. From a Baccalaureate degree program.

Q. Okay. Now, when you say her level of experience in community health nursing was the only consideration, what -- were you aware in 1993 that she had been working at the Turtle Mountain Reservation Indian IHS there for several years, since May, 1991?

A. She was as a clinical nurse, correct.

Q. Okay. And you were aware of that?

A. Right.

Q. What value did you give to that in assessing her grade in 1993?

A. I couldn't give any, because it was -- the standard stated it was restricted as to community health nursing.

Q. So she got no value for that whatsoever?

A. As a -- for up to grade 7.

Q. You were aware that she was a grade 9 at that time?

A. As a clinical nurse, yes.

Q. Why did you feel it was necessary that she be demoted?

A. Because she did not have the specialized community health nursing experience.

Q. And you're referring to the civil service standards?

A. Yes.

Q. Did you have any standards that you applied that related uniquely to Indian preference issues?

A. Excuse me, Sir?

Q. Did you have any standards that you applied that related uniquely to experience on her -- to experience in working within her own reservation?

A. You mean, are you referring to applying Indian preference?

Q. I'm referring to whether you had established whether you applied any special standards that were different from civil service that were meant to reflect her Indian background.

A. No. The only thing -- the only thing I can do is give preference in referral, if -- you know, if you're an Indian candidate.

Q. As to whether they get hired or not hired?

A. As to whether or not they're referred.

Q. Uh-huh. As an eligible candidate?

A. Correct.

Q. And as to the grading of what they come in as the grade, there's no preference given that way whatsoever?

A. No, Sir.

MR. LEVENTHAL: Thank you. I have nothing further and appreciate your getting together with us by telephone.

MR. HAYDEN: Delbert, I have a few questions for you, okay? Can you hear me okay now?

THE WITNESS: Yes, Sir.

EXAMINATION

BY MR. HAYDEN:

Q. When you rated the plaintiff in this case, Marilyn Dionne, did you objectively rate her without any discriminatory intent?

A. Yes, Sir.

Q. Are you familiar with those guidelines?

A. Yes, Sir.

Q. What do those guidelines indicate as far as minimal standards concerning grading of nurses?

A. They have no bearing on grade level.

Q. Could you explain that a little bit more? What do you mean by that?

A. It is -- first of all, we ask is the individual an Indian, and if so, does he or she have verification of that, whether by something, a document in their personnel folder or an Indian verification of Indian preference document, and if -- if that document exists, he or she would be considered. You further evaluate to see if the person is qualified. If he or she is qualified, he or she would be referred.

Q. And then probably selected over a non-Native American applicant?

A. A non-Native American applicant would not be referred if we had an Indian preference applicant.

Q. And by referred, do you mean referred for the purposes of selecting that person for the job?

A. Yes, Sir.

Q. Following that point in time, do the regulations adopted by the agency apply to minimum standards for the job? Grading the person, in other words?

A. No. The qualification standards dictate how and where an application -- where an individual would be and what grade level they would be referred at.

Q. And it's your understanding, based upon the agency directive to you, that the qualification standards should be applied once a person has been selected, even though there's

something called the Indian preference statute? Do you understand what I'm saying?

A. No, Sir.

Q. Even though the Indian preference statute is in existence, are you still required to apply the qualification standards once a person has been selected for a position?

A. We -- we cannot make a selection without a qualification determination.

Q. A person has to be qualified for the job?

A. Right.

Q. For example, you couldn't hire a welder to be a nurse.

A. No, Sir.

Q. Once a person is hired for the job, then are you required to apply the qualification standards, as far as grading is concerned?

A. We make that determination before he or she is referred.

Q. So it's all done at one time?

A. Right.

Q. Are you familiar with any agency rules which require you to ignore the -- well, strike that. Is there any way in this case, based upon the regulations that you looked at, that you could have elevated the prior LPN community health

experience into qualifying experience to satisfy the GS-9 or 11 level?

A. No, Sir.

Q. Why do you say that?

A. Because it was not as a Bachelor's degree level registered nurse.

Q. Based upon the qualification standards that you go by.

A. Right.

Q. Are you familiar with the rating of Linda LaFromboise, Doris Gunville or Marianne Belgrade?

A. Yes.

Q. Or Belgarde, I mean.

A. Yes, Sir.

Q. Did you do those ratings also?

A. I believe I did, Sir.

Q. Were you objective in rating those individuals?

A. Yes, Sir.

Q. Did you have any discriminatory intent or utilize any discriminatory practices in rating those three individuals?

A. No, Sir.

Q. And apparently they all work as public health nurses at this time.

A. At this time, yes.

Q. Were they required to take a lower level GS pay as a result of their switch from whatever they were doing to the public health nurse position?

A. I believe one of them may have. What are the other names?

Q. Linda LaFromboise, Doris Gunville and Marianne Belgarde.

A. I believe just Linda LaFromboise. Maybe perhaps, Doris Gunville. I don't recall, but I know the other name, Marianne Miller --

* * *

me, but do you recall reading in her application that she said that she taught these, that she taught classes?

A. From '83 to '87?

Q. From '91 to '93, during the time that she was a clinical nurse. In fact, do you -- you -- in fact, she even stated, did she not, that she's on the -- that she's on the teaching committee regarding teaching of -- of medical issues on the reservation?

A. I don't -- I don't recall that.

Q. Excuse me?

A. I don't recall that in the application.

Q. If you had that knowledge, wouldn't you have considered that to be duties of public health duties that she was doing, whatever the title of the job is, that she was doing those duties?

A. If she -- you know, if you stated that she was doing those in the community, that would have been qualified. How long did she do them?

Q. My understanding is that it was throughout the period that she was -- that she was working as a --

A. Could I ask, are you reading that from a document on that application?

Q. I'm referring to her application on what's stamped as page 33.

MR. HAYDEN: The SF-171?

A. Okay. Is it the 171 or is it something supplemental?

Q. It says 171-110.

A. 171-110, is that an application?

Q. Were you aware that she made home visits on a fairly regular basis when the ambulance would go out, that she would often accompany the ambulance driver in order to assist the -- in order to assist the party when they arrived at their destination?

A. In what capacity?

Q. In her capacity as a nurse for the public -- or for the Indian Health Service.

MR. HAYDEN: Clinical nurse.

Q. At the time she was a clinical nurse, were you aware that she was doing that?

A. It doesn't -- I don't recall, I guess, reading that in my -- in the application.

Q. Were you aware that she frequently was consulted by members of the community on questions of -- regarding medical resources that were available and that she received such calls and handled them while she was at work and also while she was at home?

A. I'm not aware of that, that that was going on.

Q. Were you aware that sometimes she'd get calls from community people asking her to stop by the house in order to

talk about a certain medical problem or medical resources, and that she did that?

A. No. I have no idea that she has done that.

Q. Would all of that be relevant to the decision as to whether she had the proper public health service background and experience?

A. Is it management directed or --

Q. Well, I'm asking you, from the -- as the person who makes the decisions, whether you would find all of that relevant.

A. Perhaps. I would need to know what percentage of time she did it.

Q. Uh-huh.

A. How much time she did do it.

Q. I'll be done here in just a minute. Just a couple quick questions. Are you familiar with Shelly Harris?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

MARILYN DIONNE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. A4-96-130
	)	
DONNA E. SHALALA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAY GRANBOIS, DIRECTOR OF PUBLIC HEALTH SERVICE-BELCOURT, AND MICHAEL H. TRUJILLO, DIRECTOR OF INDIAN HEALTH SERVICES,	)	
	)	
Defendants.	)	

TRANSCRIPT OF TELEPHONE DEPOSITION OF

MARILYN DIONNE

Taken at
U.S. Attorney's Office
Bismarck, North Dakota

January 8, 1998

Q. Sure.

A. -- that you have?

Q. What I have here is your SF form, and I also have marked, if you'd-like to look at it, your two previous statements, okay? You'll see that I have them marked there, so you can look at those, too, if you would like.

A. Okay.

(Witness examines documents.)

A. The application you were looking at is where?

Q. That would be way at the end.

A. At the end?

Q Right.

(Witness examines documents.)

A. Okay. Basically, my duties as a home health nurse at that time was to go into the home and provide patient care.

Q. Were those your assigned duties?

A. Yes.

Q. Okay.

A. Setting up medications, doing the assessments, assessing their mental and physical capabilities.

Q. How many hours a week? Would this be

* * *

Q. Okay. Was there a difference in 1987 through 1991 as to what an RN could do and what you could or could not do?

A. Probably give, like, blood products, chemotherapy, that type of thing. I think that was some of the limitations, yes.

Q. What else did you do, then, between 1987 and 1991, anything that would be non home care related, more in the clinical field?

A. No. It was all community based.

Q. How was it that you were working 32 hours a week and still, yet, maintaining your school schedule?

A. The University of Mary has a program for LPNs or RNs that want to return back to work -- to school and still be able to work-full-time or part-time, or whatever, and we would travel down every two weeks and come down for, like, three or four days a week, or whatever was required, and then go back home and work and take care of your family.

Q. So you'd go -- where would you go to school, then, actually physically?

A. The University of Mary.

Q. So you'd travel down --

A. Yes.

Q. -- to Bismarck? Would that be one day a week, or how would that work?

A. Every two weeks we'd come down for, like, two or three days.

Q. Okay. I understand now. Was there some video conferencing there, too, or work at all?

A. No, thank God.

Q. I think they do some of that now, don't they?

A. I think they do.

Q. All right. So did you graduate in 1991?

A. Yes, I did.

Q. And what type of degree did you obtain?

A. Bachelor of Science in nursing.

Q. And then you took your RN boards?

A. Yes.

Q. Passed them?

A. Yes.

Q. And became an RN in 1991?

A. Yes.

Q. After you became an RN, did you still work for Tri Care?

A. No.

Q. When did you quit?

A. '91.

Q. Prior to taking your boards?

A. In May, when I started working for the Indian Health Service.

Q. Okay.

A. I resigned, yes.

Q. You resigned in May of 1991?

A. Yes.

Q. When did you take your boards?

A. October. I think it was October. I'm not real sure.

Q. Of 1991?

A. Yes.

Q. What did you do, then, after October of 1991, did you go back to school or did you go back to work?

A. No. I worked for Indian Health Service from May 17th until now.

Q. Okay. So in May of 1991 you started working for IHS?

A. Yes.

Q. Did they hire you as an RN or LPN?

A. As a graduate nurse.

Q. As a graduate nurse. So basically, they're phasing you in at that point?

A. I guess, yes.

Q. What did you do between -- for job duties between May of 1991 and October of 1991?

A. Functioned basically as an RN with the supervision of a charge nurse, or whatever you want to call them.

Q. How would you define a charge nurse?

A. One that has been there for a while.

Q. You were doing clinical duties at that time?

A. Yes.

Q. And you were a GS-9-1, or what were you hired as?

A. GS-7.

Q. And then you worked your way up to a GS --

A. 9-2.

Q. -- 9-2?

A. Yes.

Q. So basically, in your SF-171, at that point you describe clinical duties working as a clinical nurse here --

A. Yes.

Q. -- for the IHS in 1991.

A. Yes. That tells you, you know, on those other ones, too, the EEO complaint and the --

Q Right.

A. Yes.

Q. Now, apparently on the SF-171 you also indicated that you were a career conditional employee.

A. I did?

Q. There's three boxes, one was temporary, one box is career conditional, one box is career, and one box is accepted service, and you marked the box career conditional.

(Witness examines document.)

A. It must have been what I was at that time. It must have been on one of the other forms that I took it from.

Q. I'm not so sure I understand what conditional means right now.

A. I don't either.

Q. And you don't remember either?

A. No.

Q. And I don't know if it was on this form or SF-172, which would be a supplemental form, but you indicated in taking the job that you would voluntarily agree to take a job at a GS-7 or a 9 level. Do you remember that?

A. No.

Q. All right. Let's see if I can find that.

A. As clinical or PHN?

Q. As a public health nurse.

A. Okay.

Q. I don't know that I have the supplemental SF form here, but you're saying you don't remember that right now?

A. No. It's probably what they told me I had to work.

Q. Did somebody help you fill out the SF forms?

A. No. I did. I took -- I inputted the information. Whatever information I needed I took it off of, probably, the -

Q. Instructional sheets, or what?

A. The sheet that has all the information. Once you're hired you get the form, the SS --

Q. I'm not sure.

A. The same sheet that indicates promotions and whatever changes there are.

Q. All right. I guess what I'm getting at is, your attorney, when he writes his briefs, and things like that, he refers to your job change as a demotion, quote/unquote.

A. Uh-huh.

Q. Apparently you also think of it as a demotion --

A. Yes.

Q. -- when you originally took the public health nurse position.

A. Yes.

Q. What I was getting at is, my recollection, and I don't see the form here, is you indicated on your SF form that you would agree to take a job at the GS-7 or a 9 level to -- if that made a difference as to qualify for the job, but you don't remember that?

A. No.

Q. Okay. Now, apparently when you applied for that job for public health nurse there was -- my understanding was that there was no other one person applying for the job, or am I wrong there?

A. They had just hired a nurse prior to that.

Q. Okay. But there wasn't any -- you didn't have any problems getting the job. I mean, there was no competition between a white nurse and you.

A. I think Sue had applied then.

Q. Sue Kartes?

A. Uh-huh. Yes.

Q. And do you think you got preference over her at that time for that job?

A. Meaning what, preference?

Q. Because you were a Native --

A. I don't know if that reflects that at all.

Q. I don't, either. I guess I was wondering if you knew.

A. No, I don't.

Q. But you did get the job, according to your recollection, over Sue Kartes?

A. I think I got it according to my background.

Q. Well, there's something called the Indian --

A. Related to my work.

Q. -- the Indian Preference Act, too. If you apply for a job and a white woman/nurse applies for the job, you will get the job over her.

A. That's what they say, yes.

Q. Right. So then you were hired, and I have here the date that you were hired, and I don't know if this is right, or not, it says 5/19/91, but that wouldn't be right.

A. That was in 1991.

Q. You were hired as a clinical nurse in 1991?

A. Yes.

Q. As a GS-7?

A. Yes.

Q. Then you worked your way up to a GS-9 as a clinical nurse?

A. Yes.

Q. Okay. Then you were hired in June of 1993 as a public health nurse?

A. June 1st, yes, was my first day.

Q. All right. Okay. So now, up to this point, would it be fair to say that the experience that you had in the public health nursing field prior to applying for the public health nurse job was with Tri Care?

A. Some of it, but it also continued on as a clinical nurse, because there were things that we still did out in the community. I taught -- I'm a CPR instructor and also first aid instructor, so I taught that out in the community.

Q. Okay. My question is, any experience --

A. And working with clients.

Q. -- any experience you had prior to 1993 as a public health nurse --

A. Uh-huh.

Q. -- did that come from anyplace else besides Tri Care?

A. The majority of it came from there. That was my background, yes, in working with the Native American people, yes.

Q. Did you have any other public health nursing experience outside of Tri Care?

A. As a public health nurse?

Q. Correct.

A. No, except what I got as a clinical nurse from working with the community.

Q. But you were mainly a clinical nurse after 1991. Your job description would be a clinical nurse?

A. Job description, yes.

Q. All right. Did you maintain -- is there something you have to do to maintain an LPN license or an RN license every year?

A. No. Just renew them.

Q. Did you keep your LPN license current?

A. Yes.

Q. And your RN license, has it always been current?

A. My LPN license, I let it go after I passed my state boards as an RN.

Q. As an RN?

A. Yes.

Q. Now, and I'm not so sure I have these dates correct, but do you remember when Susan was hired as a public health nurse, Susan Kartes?

A. She's hired May of '94. I'm not sure of the date, but --

Q. So that would be about a year after you were hired?

A. Yes.

Q. And obviously, then, you did not compete with Susan -- well, you might have competed for a position in 1993, but --

A. For the -- for IHS, or the Indian Health Service, you have to update your application every six weeks -- every six months in order to keep it on file, otherwise it's discarded.

Q. How did you find out that Susan was hired as a GS-11?

A. She told me.

Q. And did she say anything else about that or did she just tell you I was hired as a GS-11 during a casual conversation?

A. It was through -- as a conversation. I and Sue are friends. We work together.

Q. Okay. Did she say anything to you about whether or not she thought that was discrimination?

A. I guess a conversation went on to when she said she was hired as a GS-11, and I said: "You're hired as a GS-11?" And she said: "Yeah." And I said: "Well, how can that be, when I do exactly the same thing that you do and more?"

Q. She didn't understand it?

A. No. That's what -- she said: "Then maybe you should go and talk to Georgia Artz."

Q. Did you go, then, and talk to Georgia?

A. Georgia was aware of the discrepancy, yes.

Q. Did you talk to her?

A. Yeah, we did.

Q. What did she tell you?

A. She basically said that Aberdeen has the last choice in who rates who.

Q. She didn't say something like: "Yeah, I think we discriminated against you"?

A. No. No.

Q. Okay. Did anyone else at the hospital or from Aberdeen ever indicate that they discriminated against you?

A. It's -- it is known that it is discouraged for the nurses working in the hospital and IHS to be able to transfer to the Indian -- to the public health nursing.

Q. Okay. Before we get to that, let me ask you, has anyone said directly to you, any government employee, that there is discrimination against you in this case?

A. Against me?

Q. Right. Or there was discrimination because you're Native American and that's why you were hired as a GS-7, as opposed to a 9 or 11.

A. No. They just told me that's just the way it is.

Q. Okay. And would it be fair to say that when they said that, I mean, they were referring to what Aberdeen does?

A. I don't know. They just told me that's just the way it is.

Q. Because in my mind, that doesn't necessarily mean somebody's admitting discrimination when they say that's just the way it is. They could be referring to several possibilities there.

A. I suppose.

Q. Okay. Going back to what you said, it is known that, and then you made a statement. You know, as lawyers we deal with hearsay and innuendo, and things like that, rumors, etcetera.

A. Yes.

Q. Where does your information come from?

A. What do you mean by information?

Q. You said it is known that nurses aren't --

A. I get the information from Lynn Davis and Linda LaFromboise, and they got their information from Aberdeen, Mr. Bad Moccasin, I believe his name is Don Bad Moccasin, and I think that's in some of the paperwork, too, somewhere, I think, even in the rebuttal or the --

Q. Lynn Davis and Linda LaFromboise, are they nurses?

A. Lynn Davis is our administrative personnel officer.

Q. Okay.

A. And Linda LaFromboise is another public health nurse.

Q. And what did they say to you, that you can remember?

A. That it was discouraged from the nurses within our hospital to transfer to public health nursing and that's why they did it, that they would make them take a demotion or back step instead of letting them go in directly as a -- and say that if it was me, I took a 7-9 instead of a 9-2.

Q. Did they say nurses or Indian nurses?

A. No. Our nurses at our hospital, yes.

Q. Okay. But there are white nurses there too.

A. Well, I think it says Native American in my rebuttal, or one of the --

Q. Okay. I'm asking you for what your recollection is.

A. It would be Native Americans.

Q. Did Lynn Davis or Linda LaFromboise, when they made that statement, did they refer specifically to Native Americans?

A. Native Americans, yes.

Q. And they indicated to you that their information came from Mr. Bad Moccasin?

A. Yes.

Q. Okay. Do you know of any white nurses who have applied for a nursing position as a public health nurse and had to take a decrease?

A. Demotion?

Q. No. I'm not going to call it a demotion. A step decrease.

A. No.

Q. Do you know of any other Native Americans who have had to take a step decrease when they applied for and were accepted to --

A. Yes. Yes.

Q. -- a public health nurse position? And what are their names? I think you've given them to me before in the interrogatories, but why don't you give them to me again.

A. Linda LaFromboise, Doris Gunville.

Q. Just a minute. How do you spell Doris's last name?

A. G-U-N-V-I-L-L-E.

Q. Okay. Who else?

A. And Marianne Belgarde.

Q. Okay. Did they ever tell you, did Linda, Doris or Marianne ever tell you what experience they had?

A. As what?

Q. As to whether or not they had the one year of qualifying public health nurse experience

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

MARILYN DIONNE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. A4-96-130
	)	
DONNA E. SHALALA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAY GRANBOIS, DIRECTOR OF PUBLIC HEALTH SERVICE-BELCOURT, AND MICHAEL H. TRUJILLO, DIRECTOR OF INDIAN HEALTH SERVICES,	)	
	)	
Defendants.	)	

TRANSCRIPT OF TELEPHONE DEPOSITION OF

GEORGIA ARTZ

Taken at
U.S. Attorney's Office
Bismarck, North Dakota

January 8, 1998

Q. So you have been there during the period of time in which Marilyn Dionne has worked since 1991?

A. Yes, Sir. I was not responsible for her hiring, but I was here at the time she was hired.

Q. And did you have contact with her when she was working as a clinical nurse prior to becoming a public health nurse?

A. Occasionally. Not on an everyday basis, no. Are you there?

Q. Yes, I am.

A. Okay. I'm sorry.

Q. Okay. You've mentioned serving the community when you were speaking of your duties. What is the community?

A. Our community is the reservation line. We are allowed to provide our services within Rolette County. When you look at IHS, they look at the size of the reservation. We serve, approximately, a population of about 10,000 people. Our boundaries are the Rolette County reservation -- or the Rolette County line and, basically, probably 90 percent -- well, the people we serve have to be Native American.

Q. The work you do is, essentially, in the public health nursing. What does that involve? What is the public health nursing component at the IHS?

A. Okay. Some of the things that we do are, most of our program is focused on preventive services, and that would be such things as PAP smears, educating people about breast

exams, smoking issues, sexuality classes, things such as that. We also, because we have a high population that do not have third party reimbursement insurance, we have to serve some of those individuals when they come back from the hospital and they're not eligible for home health care services, and that doesn't happen real often, but there are a few clients that we see that we call them as help maintenance. We see them for regular blood pressure checks or help prepare their pills. Most of the things that have to do with IVs, we leave that strictly to the home health agencies. We do some dressing changes, not a lot.

Q. You have a great deal of interaction, then, rather, with the community itself.

A. A lot. The -- probably a hundred percent -- a hundred percent of what we see is community. We do not do any services, except for a few shots inside the hospital.

Q. Do you find, then, that an individual who is a member of the Turtle Mountain Band and who has grown up in the community and who has become a registered nurse has a special ability and value in being able to relate to community members?

A. Yes and no. To a certain extent. I have found living in the community -- I've been here since 1971. My father was a Native American, my mother was not -- that there are a lot of -- what do I want to say? A lot of hard feelings carried over from generation to generation, from family to family within the reservation itself.

We have families that fight amongst themselves, and a lot of times I've seen it as being actually a problem at times and that some of our staff don't want to see other people on

the reservation because their family members were involved in a fight ten years ago.

What I do feel is that anybody who's lived in the area, regardless of their color, is just as easily qualified to work with these people as anybody else, because they've lived here most of their life and they know the people. Rolette County is probably 90 percent Native American, and I guess I believe that if people live here, they like it here and they get along with the people.

Q. Has Marilyn Dionne been able to utilize her contacts in the community to advantage?

A. I would say so, yes. She has a good rapport with her staff, with her -- I mean her clients.

Q. How has her work been, generally?

A. I have no complaints. Not one.

Q. Given her positive ratings?

A. Yes, very much so.

Q. When -- what is a preceptor?

A. A preceptor?

Q. A preceptor, uh-huh.

A. I guess it depends on where you're at and what you're looking at. When you look at a preceptor from a school point, you're probably looking at somebody who comes -- you come and work under them and they kind of guide you and lead you and they kind of check over you.

Kind of somewhat of a mentor. One that I was in nursing school, myself, we went to six weeks of training and you have a preceptor and the preceptor's the person you work side by side with and she signs off on a lot of things when you're -- of course you're not an RN at the time, your a student nurse, and so she has to sign off on your orders or medicines, or things like that, but she's basically there to help you and help sometimes train you. It may not be to train you, it may be just to kind of supervise you.

Q. And do you select a preceptor towards a new employee in order to help that new employee become acclimated to the community?

A. Not so much to the community as to the way the government system is set up. Most of the people that I believe that I have hired here are familiar with the community. If somebody's been assigned to somebody else, it's then to show them the system within the hospital and how the things are ran within the hospital, as far as the forms we use, how we go about making a referral from the clinic to public health nursing or from inpatient nursing, situations that are mostly in-house.

Q. When Marilyn Dionne commenced work as a public health nurse, was there a preceptor to assist her?

A. I believe at first I had asked Sue Kartes, she had to help Sue Kartes, because Sue Kartes was new to the government system.

Q. You're referring to work that Marilyn Dionne did and she served as a preceptor to Susan Kartes; is that correct?

A. Well, I guess I really hadn't put them -- I just asked the nurses -- what I had did is not officially, I had taken a list

and asked them to help these nurses out, and -- and just help them with getting through, like, if they don't know what forms to use, you know, because Marilyn was previously in the hospital and she knew what forms to use, and at the time Marilyn and most of the other staff were hired we were hiring -- doubling -- more than doubling our staff, so we had quite a few people coming into the facility at once who were not aware of the government forms and how to go about procedures within the government system, and this hospital in particular, and so that I had taken all the nurses who had previously come in and those who were here and asked them to help -- not so much train them, but asked to help them with -- if they had any questions, this is who you go to. If you want to ask a question, they probably could help you.

Q. And Marilyn Dionne was assigned as the preceptor for Susan Kartes?

A. I had asked her if she would go ahead and help out Sue, and I believe a week or two later she came back to me and didn't feel comfortable doing it, so then I told her I would take Sue, and I ended up taking Sue. And I don't -- I don't recall that there was any reason why she said that she did not feel comfortable, I just know that she asked not to do it, and then I said I would take her then.

Q. In fact, wasn't it the other way around, where you were working as the preceptor towards Susan Kartes and Marilyn was working as a preceptor for Virginia Thomas, but Virginia Thomas dropped out and Marilyn was asked by you, then, to work with Susan Kartes?

A. Virginia Thomas has never been employed by this office, that I know of.

Q. Wasn't she scheduled to come aboard and Marilyn assigned to assist her?

A. I remember that Virginia considered taking a position here and she had refused the position. I don't recall making any schedule ahead of that time stating that Marilyn would be a preceptor to her.

Q. Do you recall posting preceptor assignments that were listed as preceptor assignments that had on there Doris Gunville dash Marge Peterson, ends 5/95; Linda LaFromboise dash June Eagle, ends 5/95; Marianne Miller dash Vay Slinky, ends 9/95; Virginia Thomas dash Marilyn Dionne, ends 9/95, with Virginia Thomas crossed out with an arrow, then, to the latter one, which originally said Susan Kartes, Georgia Artz, ends 5/95?

A. I do recall posting a list, but at this time I cannot recall who was all on the list. I do not remember that Virginia Thomas's name was on there. It may have been, but I do not recall that.

Q. When Marilyn Dionne started in the public health service as a public health nurse, was there a preceptor that was asked to assist her?

A. I couldn't answer that question, because I -- it was not I. That, I do know, because I was working under another supervisor, as well as Marilyn at that time.

Q. Have you found that individuals who are RNs often have to take a decrease in their GS level in order to work as a public health nurse at Belcourt?

A. That is depending on where the PHN has come from. In my own circumstances, I worked -- I

* * *

the city are getting credit and higher ratings than -- or higher GS rankings than the individuals who spend their time working on the reservation?

A. I guess that depends who you're working for. In Marilyn's situation, she had worked for the Bureau of Indian Affairs, which is counting as government service, and so she's allowed to carry that service time over to this current job, which would put her at -- you know, she may not -- she would not receive any more pay or less pay than another nurse coming in, but she's at the advantage that her leave is going to be built up faster. She's going to have -- her annual leave is going to be built up faster, she's going to be at the higher level of earning her annual leave, and she's at an advantage. People who have worked on the reservation through government agencies actually have had the advantage.

Q. Can you give any explanation as to why Marilyn Dionne came in at a GS-7 level and Susan Kartes came in at a GS-11 level?

A. Well, it is my understanding -- now, you have to remember that I did not hire Marilyn.

Q. Uh-huh.

A. It is my understanding that when Marilyn applied for this job, she had been an RN, I guess, approximately a year, had served her one year general experience in the clinic. She had only been an RN for over a year. The minimum qualifications to enter as a GS-7 are one year general experience as a 7. To get a GS-9 you would have to have public health nursing experience or home health nursing experience as an RN, and Susan Kartes had those qualifications and Marilyn Dionne did not.

When Marilyn Dionne worked for the home health agency in Rolla she was an LPN, and obviously we know that the differences between LPN and RN are different or they would be the same.

Q. You are familiar with Marilyn working at the IHS in Belcourt as a clinical nurse for a period of about two years before she became a public health nurse?

A. I'm sorry, could you repeat that?

Q. Yeah. You've indicated before that you were familiar that Marilyn was working as a clinical nurse at the IHS at Belcourt prior to the time she became a public -- assume the public health nurse position.

A. That is correct. I couldn't state the time frame, because I'm not sure of that, but I did -- yes, I worked with her when she'd bring referrals down, and I knew Marilyn previously to that, also.

Q. Okay. And you were aware that she talked to people in the community, would bring people in for assistance, accompanied the ambulance when it went out to assist people in the homes, gave first aid training to people in the community, did training on other -- other aspects in the community, you were aware, generally, that all this was going on?

A. Back before she was hired, I don't know that I could say -- I may have known that she was doing a class at the college, but to say that -- what her other activities were in the clinic, I guess I would not know that.

Q. Is there anything of what I've mentioned that you have reason to believe she was not doing?

A. No. Not at all.

Q. If indeed she was doing those items, would you not believe that that is exactly the type of community involvement and experience which should be credited in assessing a grade as a public health nurse?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

MARILYN DIONNE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. A4-96-130
	)	
DONNA E. SHALALA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, RAY GRANBOIS, DIRECTOR OF PUBLIC HEALTH SERVICE-BELCOURT, AND MICHAEL H. TRUJILLO, DIRECTOR OF INDIAN HEALTH SERVICES,	)	
	)	
Defendants.	)	

TRANSCRIPT OF TELEPHONE DEPOSITION OF

SUSAN KARTES

Taken at
U.S. Attorney's Office
Bismarck, North Dakota

January 8, 1998

Q. So you, at no time, had a GS rating prior to coming to work at Belcourt?

A. No, I did not.

Q. And when you came to Belcourt, work at Belcourt, what rating was assigned to you?

A. I was started at a GS-11.

Q. And you've progressed since that time?

A. Correct.

Q. You work with Marilyn Dionne?

A. Yes, I do.

Q. And how would you rate her performance?

A. I have no -- I'd say positive for her nursing abilities.

Q. She was working there prior to your coming aboard, was she not?

A. Yes, she was.

Q. And, in fact, she served as a preceptor for you, did she not, for a while?

A. There were several of us starting at one time and we just -- I don't recall. I just don't recall. There was -- we all just kind of worked together, asked questions together, if there were any.

Q. You don't recall?

A. Who was assigned, no. No, I don't.

Q. You don't recall whether she was assigned to do that, or not, is that your answer?

A. Yes.

Q. Are preceptor assignments posted on the board?

A. At one time they were posted, I think, when we were all initially -- some of the staff that were here. I don't know if there's one posted anymore.

Q. Was Marilyn Dionne helpful in giving you information as to the hospital and the community?

A. Yes, she was.

MR. LEVENTHAL: I have nothing further. Thank you.

THE WITNESS: You're welcome.

MR. HAYDEN: Susan, I have a couple of quick questions for you, then we'll be done here.

THE WITNESS: Okay.

EXAMINATION

BY MR. HAYDEN:

Q. Did you apply, prior to 1994, for a position as a public health nurse?

A. I -- my first application, I believe, was in April of '93.

Q. Was that at the same time that Marilyn Dionne had applied, also?

A. I -- I don't know whether she had applied.

Q. Apparently you did not get that first job.

A. Correct.

Q. Do you know who did get it?

A. No, I don't.

MR. HAYDEN: All right. That's all the questions I have for you. Again, you heard us talk about the right to read and sign the deposition --

THE WITNESS: I did.

MR. HAYDEN: -- and the waiver of that. Would you also like to waive the reading and signing of the deposition?

THE WITNESS: Yes, I would.

MR. HAYDEN: All right. Thank you. This concludes this deposition and you're free to go.

THE WITNESS: Thank you.

MR. HAYDEN: Thank you very much. Signing off.

MR. LEVENTHAL: Thank you. Bye.

(Adjourned at 4:05 p.m., the same day.)

Preceptor Assignments

Doris Gunville - Marge Pederson ~~ends~~ 5/95

Linda LaFromboise - June Eagle " 5/95

Mary Ann Miller - Vay Slinky " 9/95

~~Virginia Thomas~~ - Marilyn Dionne " 9/95

Susan Kartes - Georgia Artz " 5/95

(2)

Supreme Court, U.S.
FILED
DEC 27 2000
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No. 00-468

In the Supreme Court of the United States

MARILYN B. DIONNE, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether the Secretary met her burden of producing a nondiscriminatory explanation for an adverse employment decision affecting petitioner.

2. Whether the Secretary's failure to apply the Indian Preference Act standards was sufficient to give rise to an inference of intentional discrimination.

3. Whether petitioner's additional evidence was sufficient to give rise to an inference of intentional discrimination.

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In the Supreme Court of the United States

No. 00-468

MARILYN B. DIONNE, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 209 F.3d 705. The opinion of the district court (Pet. App. A18-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2000. A petition for rehearing was denied on June 27, 2000 (Pet. App. A30). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a member of the Turtle Mountain Band of Chippewa Indians. Pet App. A3. In May 1991,

petitioner began work as a General Schedule GS-7 clinical nurse for the Belcourt Hospital of the Indian Health Service (IHS), an agency of the Department of Health and Human Services. *Ibid.* After one year, petitioner received a promotion to GS-9. *Ibid.* In September 1992, petitioner applied for a public health nurse position with Belcourt Hospital. *Id.* at A3-A4. The vacancy announcement stated that a hiring preference would be accorded to eligible Indian applicants under the Indian Preference Act (IPA), 25 U.S.C. 472. The IPA gives employment preference for IHS positions to Indians who are members of federally recognized tribes.

Petitioner was referred for selection to Delbert Haskell, an IHS personnel staffing specialist. Pet. App. A4. Haskell evaluated petitioner's qualifications in accordance with general civil service standards, including the so-called X-118 standards. *Id.* at A5 & n.4. Applying those standards, Haskell concluded that petitioner was qualified for a GS-7 public health nurse position, but that she was not qualified for a GS-9 position. *Id.* at A4. Haskell reached that conclusion because, under the X-118 standards, in order to be eligible for a GS-9 position, an applicant must have one year of specialized professional nursing training that is comparable to the next lower grade in that specialty, and Haskell believed that petitioner's experience as a clinical nurse did not satisfy that requirement. *Id.* at A4, A22-A23. Petitioner voluntarily accepted the GS-7 position. *Id.* at A4.

One year later, petitioner learned that IHS hired a non-Indian as a GS-11 community health nurse. Pet. App. A4. The nurse, Susan Kartes, had a bachelor's degree and three years of community health nursing experience. *Id.* at A23. Using the same standards that

he applied in petitioner's case, Haskell concluded that Kartes met the requirements for the GS-11 grade and rated her accordingly. *Ibid.*

2. After exhausting administrative remedies at Belcourt Hospital and the Equal Employment Opportunity Commission, petitioner filed suit in federal district court against the Secretary of Health and Human Services, alleging that the decision classifying petitioner as a GS-7 was based on race and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16 (1994 & Supp. IV 1998). Pet. App. A4. The district court granted summary judgment in the Secretary's favor. *Id.* at A18-A27.

The district court first found that petitioner had established a prima facie case of disparate treatment by showing that (1) she was a member of a protected class; (2) she qualified and had applied for a community health nurse position at Belcourt Hospital; (3) IHS denied her a position above grade GS-7; and (4) a non-Indian was hired at grade GS-11. Pet. App. A22. The district court next determined that the Secretary had articulated a legitimate non-discriminatory reason for the grade classification—that petitioner failed to satisfy the X-118 standards for a position above GS-7. *Id.* at A22-A23.

Finally, the court determined that petitioner had failed to introduce any evidence that the nondiscriminatory explanation offered by the Secretary was a pretext for discrimination. Pet. App. A23-A27. The court rejected petitioner's argument that the Secretary's use of the X-118 standards violated the Indian Preference Act and therefore constituted evidence of pretext. *Id.* at A23-A26. The district court concluded that the application of the X-118 standards was consistent with the IPA. *Ibid.* The district court also rejected petitioner's reliance on evidence that three other American

Indian female nurses had to accept demotions in order to make the transition from clinical to community health nursing, as well as evidence that a service unit director had told petitioner that she would have to accept a GS-7 demotion, "[b]ecause that's the way it is." *Id.* at A26-A27. The court concluded that petitioner's evidence was insufficient to support a reasonable inference that the Secretary's use of the X-118 qualification standards to classify petitioner's position was motivated by impermissible discrimination. *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A17. The court agreed with petitioner that the Secretary should have evaluated her application under standards adopted pursuant to the Indian Preference Act, rather than under the X-118 standards. *Id.* at A7-A9. The court based that conclusion on evidence not presented by either party to the district court that the Secretary had adopted self-contained IPA standards for a limited number of occupations, including public heath, that did not incorporate the X-118 standards. *Ibid.* The court of appeals determined, however, that the Secretary's error in applying the X-118 standards, rather than the special IPA standards, did not support an inference of pretext. *Id.* at A10-A11. The court explained that "[t]here is absolutely no evidence that the application of the wrong standards was anything but an honest mistake." *Id.* at A10. The court added that "[w]ithout more, the evidence only shows that the Secretary applied the wrong standards in the context of a complex administrative system—a system so complex that even the parties to this lawsuit failed to bring the December 1986 transmittal to the attention of the District Court." *Id.* at A10-A11. The court also found that petitioner's additional evidence was insufficient to support a

reasonable inference that discrimination occurred. *Id.* at A9-A10.

Judge Lay dissented. Pet. App. A11-A17. He concluded that the Secretary had failed to meet her burden of producing a legitimate reason for her actions, and that petitioner's evidence was in any event sufficient to raise an inference of pretext. *Ibid.*

ARGUMENT

Petitioner contends that the court below misapplied the standards for determining whether a plaintiff has established disparate treatment in violation of Title VII. The court of appeals, however, applied the settled standards for resolving that issue, and its fact-bound application of those standards raises no issue warranting this Court's review.

1. Petitioner first contends (Pet. 14-17) that the court of appeals erred in holding that the Secretary satisfied her burden of producing a nondiscriminatory explanation for classifying petitioner as a GS-7. That contention is without merit.

Under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), once the plaintiff in a Title VII case establishes a prima facie case of prohibited discrimination, the burden shifts to the employer to produce evidence of a nondiscriminatory explanation for the decision at issue. In this case, the Secretary introduced evidence that she classified petitioner as a GS-7 because petitioner did not satisfy the X-118 standards for a classification above GS-7. Pet. App. A22-A23. That evidence was sufficient to satisfy the Secretary's burden of producing a nondiscriminatory explanation for the classification decision.

Petitioner contends (Pet. 15 & n.12, 17 n.15) that reliance on the X-118 standards was not a "legitimate"

nondiscriminatory explanation because the Secretary was required to follow the special IPA standards rather than the X-118 standards. In order to satisfy its burden of production, however, an employer need only produce evidence that it based its decision on a nondiscriminatory reason; it need not show that the basis for the decision is otherwise proper.

Hazen Paper Co. v. *Biggins*, 507 U.S. 604, 612 (1993), is controlling on that point. In *Hazen Paper*, a plaintiff who was terminated shortly before his pension rights would have vested alleged that he was subjected to discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Court held that a decision to fire an employee solely because a pension based on years of service was close to vesting would constitute a violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, but it would not constitute a violation of the ADEA. 507 U.S. at 612. The Court explained:

> Although some language in our prior cases might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (creating proof framework applicable to ADEA) (employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

Ibid.

That analysis is equally applicable here. The Secretary's use of the X-118 standards may not have been consistent with the Secretary's own procedures for classifying members of federally recognized Tribes or with the IPA. But evidence that the Secretary relied on the X-118 standards in classifying petitioner and that petitioner was not entitled to a grade above GS-7 under those standards was sufficient to satisfy the Secretary's burden of producing evidence that the classification decision was not based on race or national origin in violation of Title VII.

2. Petitioner next contends (Pet. 16-18) that the court of appeals erred in holding that a reasonable factfinder could not infer that the Secretary's use of improper standards reflected an intent to discriminate on the basis of race or national origin. As the court of appeals recognized, evidence that an employer has failed to follow its own standards can be evidence of discriminatory intent. Pet. App. A11. In this case, however, the specialist who made the classification decision explained that he thought that the IPA applied only to selection decisions, not grade classifications. *Id.* at A83-A86. In addition, the specialist "applied the wrong standards in the context of a complex administrative system—a system so complex that even the parties to this lawsuit failed to bring the December 1986 transmittal to the attention of the District Court." *Id.* at A10-A11. Moreover, petitioner offered "absolutely no evidence" that the failure to follow the 1986 procedures "was anything but an honest mistake." *Id.* at A10. In those circumstances, the court of appeals determined that the Secretary's failure to follow the special IPA standards could not give rise to an inference of intentional discrimination, and that fact-bound conclusion does not warrant review.

3. Petitioner next contends (Pet. 19-20) that she introduced sufficient additional evidence to permit a factfinder to infer that the Secretary's explanation was pretextual. In particular, petitioner relies on evidence that three other members of the Turtle Mountain Chippewa Tribe were required to take a demotion in grade in order to make the transition to community health nursing as well as evidence that an IHS service director told petitioner that she was demoted "[b]ecause that's the way it is." Petitioner, however, offered no evidence that the decisions made with respect to the other three tribal members reflected anything other than the application of neutral employment standards. And petitioner offered no evidence that the service director's statement reflected anything other than his genuine belief concerning what the qualifications standards required. In those circumstances, the court of appeals' fact-bound conclusion that petitioner's additional evidence did not raise an inference of discrimination does not raise any issue warranting this Court's review.

4. Finally, petitioner contends (Pet. 21-22) that the court of appeals misapplied summary judgment standards because it did not draw all reasonable inferences in petitioner's favor. That contention reflects a misreading of the decisions below. The court of appeals recognized that it was required to draw all reasonable inferences in petitioner's favor. Pet. App. A9-A11, A20. It simply determined that, based on the record in this case, petitioner's evidence was insufficient to permit a reasonable factfinder to conclude that the decision classifying her as GS-7 reflected an intent to discriminate on the basis of national origin or race.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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DECEMBER 2000

(3)

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No. 00-468

In the

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MARILYN B. DIONNE,

Petitioner,

vs.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. Marilyn B. Dionne petitioned this Court for a Writ of Certiorari on the ground that the decision of the Eighth Circuit Panel Majority in the instant case conflicts directly with this Court's decision in Reeves v. Sanderson Products, Inc., 120 S.Ct. 2097 (U.S. June 12, 2000).[1] Despite the fact that Petitioner framed the questions presented, the reasons for granting the writ, her argument and request for a reversal or rehearing of the Panel Majority's decision in light of Reeves, Respondent utterly ignores Reeves in her purported Brief in Opposition. The Secretary's failure to address Reeves cannot negate its precedential value in the context of Petitioner's case.

In Reeves, this Court ruled unanimously that an employee who presents a *prima facie* case of discrimination and who also presents sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for the decision at issue is entitled to proceed to trial. Therein, this Court also specifically noted that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Reeves, supra, at 2108. The case at bar presents circumstances ripe for a factfinder's determination as to whether the employer (here the Secretary) is dissembling to cover up a discriminatory purpose. It is undisputed that Petitioner established her *prima facie* case of discrimination and, further, presented additional evidence of discrimination. (Pet. 2 n.1, 7, 12). Yet, Respondent attempts to prevent the matter from properly proceeding to trial by emphasizing that the wrong standards were applied to Petitioner's application "in the context of a complex administrative system--a system so complex that even the parties to the lawsuit failed to

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[1] As Petitioner has previously indicated, Reeves was issued after the determination of the Panel Majority in Dionne v. Shalala, 209 F.3d 705 (8th Cir. 2000), while her Motion for Reconsideration was still pending. At the time, the Eighth Circuit granted Petitioner's request to submit a memorandum to supplement her Motion, giving the Eighth Circuit notice of the Reeves decision and its applicability to the case at bar. However, the Eighth Circuit ultimately denied Petitioner's Motion, while noting that Judge McMillan and Judge Arnold would have granted a rehearing. (Pet. 11).

bring the December 1986 transmittal to the attention of the District Court." (Resp. Br. 4, 7). However, Respondent's attempt to find a safe harbor in the complexity of its own employment standards for Indians is tantamount to claiming a "presumption of regularity" for itself, a contention flatly rejected as illegal in the context of the Indian Preference Act by the Ninth Circuit, in Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984).[2]

In other words, where burden-shifting is involved, Respondent essentially argues that a complex administrative system enables the agency to deprive a plaintiff of the right to trial by simply raising the flag of mistake (or the presumption of regularity), unless the plaintiff can absolutely establish that the agency terminated her employment on the basis of intentional discrimination. However, such rationale negates the legislative intent behind Title VII,[3] the

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[2] As previously noted by Petitioner, it was pursuant to the interpretation of the Indian Preference Act by the Ninth Circuit in Preston that the Secretary modified the U.S. Office of Personnel Management ("OPM") qualification standards ("X-118 standards"). In Preston, the Secretary chose to use the generally applicable civil service standards, as did the decision-maker Delbert Haskell in the instant case, to evaluate the qualifications of Indian candidates. The Secretary argued that the conduct of the IHS should be entitled to a "presumption of regularity," and that without specific proof of any separate inquiry into the Indian candidate's unique experience and background, such an inquiry could be inferred. Preston, 734 F.2d at 1372. The Preston court found the Secretary's argument to be "wholly without merit." Id. The court further stated, "There are no facts supporting, and there is no substance to, any of the Secretary's substantive arguments. To say they are frivolous would be an act of generosity." Id. at 1373. Thus, the Preston court found the Secretary's conduct to be unlawful and affirmed the district court's holding that "under section 10(e) of the Administrative Procedure Act, it was a continuing abuse of discretion for the Secretary to apply generally applicable civil service standards to Indians applying for positions in the Indian Health Service." Id.

Moreover, this stern chiding given the Secretary was based on the Ninth Circuit's recognition that the Secretary has for over 60 years persisted to refuse to correct the obvious illegality of utilizing civil service regulations without establishing independent standards that consider the unique experience and background of Indian candidates.

[3] "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. . . . 'What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

burden-shifting framework established in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Reeves, because all were premised on placing the burden on the employer to supply a justifiable explanation since an individual party is not positioned to demonstrate the thinking of an agency and its personnel. If the agency or employer can revise the process by simply claiming mistake and thereby require the employee to explain why the employer's stated reason is not a mistake, but intentional discrimination, a new rule has effectively been added to the burden-shifting framework in violation of the Administrative Procedure Act and McDonnell Douglas, to say nothing of Reeves.

2. Respondent attempts to impute the requirement under the McDonnell Douglas framework, as affirmed in Reeves, that the employer must articulate a "legitimate" nondiscriminatory reason for the decision at issue,[4] to a contention made by Petitioner. (Resp. 5-6). Respondent then contends that an employer does not have to show that the basis for its decision was proper, only that it was based on a nondiscriminatory reason. (Resp. 6). In support of this contention, Respondent relies on dicta in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (holding "simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employer's years of service"), which the Eighth Circuit, in turn, cited in dicta (Resp. 6; see also Pet. App. A-10), which includes the following language:

> I]t cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employer's race is an improper reason, but it is improper under Title VII, not the ADEA.

(Pet. App. A-10). However, Hazen does not mean that if discrimination is found to be illegal under one statute, a party cannot also establish, pursuant to another statute, that he or she has been discriminated against. As Judge Lay recognized, in his

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impermissible classification.'" McDonnell Douglas, 411 U.S. at 800-01, citing Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[4] Reeves, 120 S.Ct. at 2106.

dissent, the claims of Title VII discrimination and violation of Indian Preference in the instant case are inextricably tied together:

> This discussion of the inherent failure of unlawful reasons should not be taken out of context. . . . , the Court has noted that articulation of an illegal but true reason, unrelated to the claim at issue, may satisfy an employer's burden. However, the discussion in Hazen stands in contrast to the instant facts. Here the articulated reason was lack of qualification under the X-118 standards. The very application of such standards directly violates laws designed to give preferential treatment to Native Americans in employment. Such illegality is intricately related to the Title VII claim at stake.

(Pet. App. A-14) (emphasis added). Indeed, here the very discrimination actually complained of spoke directly to discrimination on the basis of race and/or national origin in direct violation of Indian Preference. Moreover, the Eighth Circuit Panel Majority took it for granted (as have other courts) that "a failure to apply Indian preference standards could be motivated by discriminatory animus." (Pet. App. A-11).[5]

3. Respondent contends that Petitioner offered "absolutely no evidence" that the Secretary's failure to follow the proper procedures was anything but an honest mistake or that the decisions regarding the other three tribal members reflected anything other than the application of neutral employment standards. Petitioner has previously indicated to this Court that she submitted significant additional evidence in addition to her *prima facie* case (Pet. 4-6, 4-5 n. 3, 9 n. 9, 10 n. 10, 15, 19), but the Eighth Circuit, much like the district court, *sua sponte* weighed Petitioner's additional evidence regarding pretext and found it wanting, in direct contravention of Reeves. Yet, Respondent attempts to insulate these usurpations of a fact-finder's proper role at trial from further review by repeating like a mantra that the Eighth Circuit made "fact-bound"

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[5] See also Johnson v. Shalala, 35 F.3d 402, 405 n. 4 (9th Cir. 1994) ("The district court also indicated that a violation of the Indian Preference Act might constitute a violation of Title VII, where a person was deprived of an employment opportunity because of that person's race, color, religion, sex, or national origin").

conclusions. (See Resp. 5, 7). Respondent misses the point. Facts regarding evidence of pretext are properly the province of the fact-finder at trial, not the Court of Appeals, and certainly not the District Court on Summary Judgment. That is the central lesson of Reeves. Moreover, Hazen also supports the application of Reeves with regard to indirect evidence that is properly heard at trial. Therein, this Court observed that the Court of Appeals had noted that the respondent produced indirect evidence, in the form of a confidentiality agreement he was asked to sign that was more onerous than that given his younger replacement. Significantly, this Court remanded the case to the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation, even though the issue was then before this Court in a Title VII context, recognizing that "[i]n the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision. . . is "unworthy of credence." Hazen, 507 U.S. at 613. Thus, Hazen stands for the principle recognized in McDonnell Douglas, and affirmed in Reeves, that even if a defendant meets its burden of production in a discrimination case, "[o]n remand, respondent must, . . . , be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." McDonnell Douglas, 411 U.S. at 792, 93 S.Ct. at 1817; (see also Pet. 18, 19).

Respondent cannot escape the reach of Reeves by refusing to recognize the case and citing only McDonnell Douglas and Hazen. Petitioner is entitled to her day in court.

CONCLUSION

Petitioner requests review in light of Reeves, a decision of this Court issued after the determination of the Eighth Circuit Panel Majority in the instant case and timely brought to the attention of the Eighth Circuit while Petitioner's Motion for Reconsideration was still pending. The Eighth Circuit declined to grant rehearing. Respondent fails to address Reeves.

For the foregoing reasons and those presented in the Petition of Marilyn B. Dionne, a Writ of Certiorari should be granted.

Dated this 8th day of January, 2001.

Respectfully submitted,

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